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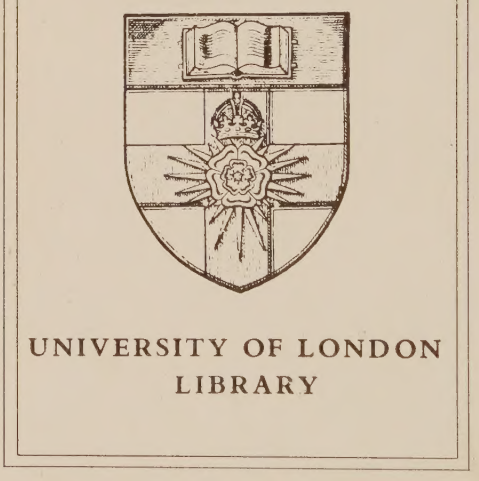

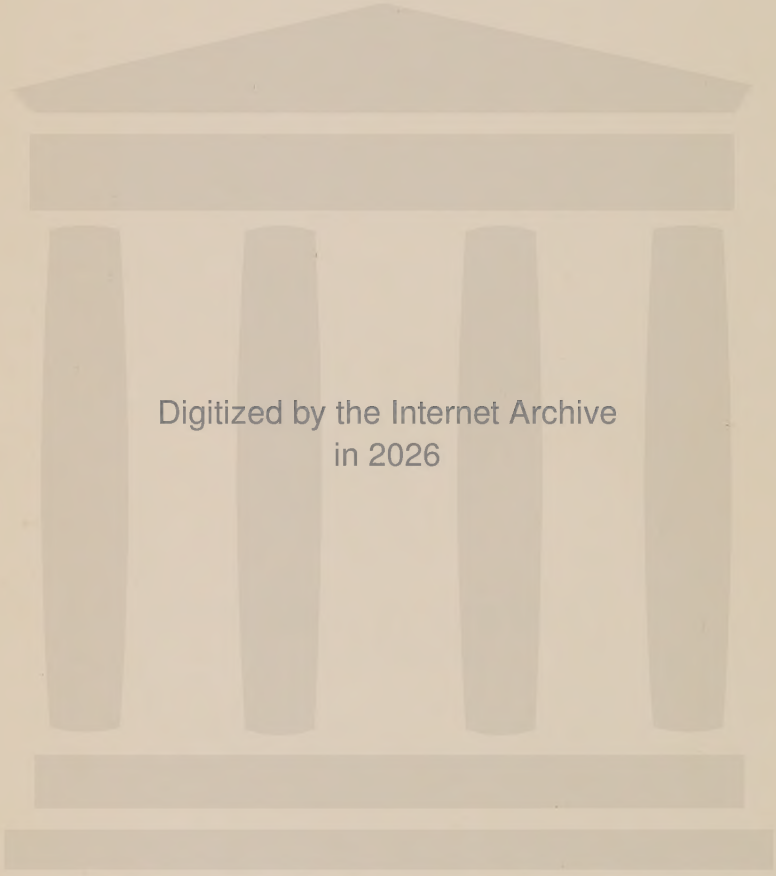
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VOL. XIX.

1887.—L & LI VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

	PAGE
A.	
Addy *v.* Blake	478
Ashcroft, In re. Ex parte Todd (C. A.)	186
Attorney-General *v.* Heywood	326
Aylmer, In re. Ex parte Bischoffsheim (C. A.)	33
B.	
Baddeley *v.* Earl Granville	423
Banner, Witt *v.*	276
Barnacott *v.* Passmore	75
Beckett *v.* Tasker	7
Bethell *v.* Clark	553
Betts, In re. Ex parte Board of Trade (C. A.)	39
Bevan, Scovell *v.*	428
Birkdale (Overseers of), Overseers of Tunnicliffe *v.*	280
Bischoffsheim, Ex parte. In re Aylmer (C. A.)	33
Bishop, Stevens *v.*	442
Blair *v.* Cordner	516
Blake, Addy *v.*	478
——, Goodman *v.*	77
Blake *v.* Mayor, &c., of London (C. A.)	79
Board of Trade, Ex parte. In re Betts (C. A.)	39
——, Ex parte. In re Mutton (C. A.)	102
——, Ex parte. In re Stainton	182
Bond, Gapp *v.* (C. A.)	200
Bourne *v.* Netherseal Colliery Company	357
Brandley Mining Company, Jenkinson *v.*	568
Brearley, Howarth *v.*	303
Bridport Election Petition. Hounsell *v.* Suttill	498
Brooks, Colquhoun *v.*	400
Brünner, In re	572
Bywater, White *v.*	582
C.	
Calvert *v.* Thomas (C. A.)	204
Cambefort *v.* Chapman	229
Carmichael *v.* Liverpool Sailing Ship Owner's Mutual Indemnity Association (C.A.)	242

	PAGE
Catley, Reg. *v.*	491
Chapman, Cambefort *v.*	229
Christie, Lishman *v.* (C. A.)	333
Civil Engineers Institution, In re Duty on Estate of	610
Clark, Bethell *v.*	553
Coales, Knight *v.* (C. A.)	296
Cole, Courtney *v.*	447
Colquhoun *v.* Brooks	400
Cordner, Blair *v.*	516
Cormack, Odell *v.*	223
Counsell *v.* London and Westminster Loan and Discount Company (C. A.)	512
Courtney *v.* Cole	447
Cox, Ex parte	307
Crears *v.* Hunter (C. A.)	341
Crofts *v.* Taylor	524
Croydon (Guardians of) *v.* Guardians of Reigate (C. A.)	385
Cuming, Reg. *v.*	13
Cutler *v.* North London Railway Company	64

D.

Darenth Main Valley Sewerage Board *v.* Guardians of Poor of Dartford Union	270
Dartford Union (Guardians of Poor of), Darenth Main Valley Sewerage Board *v.*	270
Davis, Harper *v.*	170

E.

Easy, In re. Ex parte Hill and Hymans (C. A.)	538
Eder *v.* Levy	210
Edwards, Gloucestershire Banking Company *v.*	575
English Bank of Rio de Janeiro, Royal Mail Steam Packet Company *v.*	362
Esdaile *v.* Assessment Committee of City of London Union (C. A.)	431
Essex, South-Eastern, Division, In re Election Petition for	252
Explosives Company, Reid *v.* (C. A.)	264

F.

Facey, Lea *v.* (C. A.)	352
Finney, Hughes *v.*	522
France, Yarmouth *v.*	647

G.

Gapp *v.* Bond (C. A.)	200
Gardner *v.* Mansbridge	217
Glossop, Wilson *v.*	379
Gloucestershire Banking Company *v.* Edwards	575
Goodman *v.* Blake	77
Gould, In re. Ex parte Official Receiver (C. A.)	92
Granville (Earl), Baddeley *v.*	423
Great Eastern Railway Company, Schulze *v.* (C. A.)	30
Greenwich (District Board of Works for), Vestry of St. Giles, Camberwell *v.*	502
Gurney, Palliser *v.*	519

H.

Hamill *v.* Lilley (C. A.)	83
Hanley (Recorder of), Reg. *v.*	481
Harper *v.* Davis	170
Heathcote *v.* Livesley	285
Heffer, Tonsley *v.*	153
Henderson *v.* Mersey Docks and Harbour Board (C. A.)	123
Heywood, Attorney General *v.*	326
Hill and Hymans, Ex parte. In re Easy (C. A.)	538
Hounsell *v.* Suttill	498
Howarth *v.* Brearley	303
Hughes *v.* Finney	522
Hunter, Crears *v.* (C. A.)	341

J.

Jenkinson *v.* Brandley Mining Company	568
Johnston *v.* Salvage Association (C. A.)	458

PAGE

Johnstone *v.* Marks 509

K.

Kellard *v.* Rooke 585
Knight *v.* Coales (C. A.) 296

L.

Lafone, Seton *v.* (C. A.) 68
Lea *v.* Facey (C. A.) 352
Levy, Eder *v.* 210
Lilley, Hamill *v.* (C. A.) 83
Liptrott, McHardy *v.* 151
Lishman *v.* Christie (C. A.) 333
Liverpool Sailing Ship Owners' Mutual Indemnity Association, Carmichael *v.* (C. A.) 242
Livesley, Heathcote *v.* 285
Lloyd, Reg. *v.* (C. C. R.) 213
London (City of, Assessment Committee of), Esdaile *v.* (C. A.) 431
London and Westminster Loan and Discount Company, Counsell *v.* (C. A.) 512
London, (Mayor, &c., of), Blake *v.* (C. A.) 79
Lyon *v.* Morris (C. A.) 139

M.

McHardy *v.* Liptrott 151
Mansbridge, Gardner *v.* 217
Mansel, In re. Ex parte Sayer (C. A.) 679
Maple *v.* Earl of Shrewsbury and Talbot (C. A.) 463
Marks, Johnstone *v.* 509
Mersey Docks and Harbour Board, Henderson *v.* (C. A.) 123
Midland Railway Company, Reg. *v.* 540
Mirehouse, Thomas *v.* 563
Moon, Ex parte. In re Moon (C. A.) 669
Morris, Lyon *v.* (C. A.) 139
Murray *v.* Stephenson 60

PAGE

Mutton, In re. Ex parte Board of Trade (C. A.) 102
Mutual Loan Fund, Limited, Roe *v.* (C. A.) 347

N.

Neal, Weldon *v.* (C. A.) 394
Netherseal Colliery Company, Bourne *v.* 357
Nevill, United Kingdom Mutual Steamship Assurance Association *v.* (C. A.) 110
North London Railway Company, Cutler *v.* 64
Nottingham, Ex parte. In re Tuff 88

O.

Ocean, Railway, and General Accident Insurance Company, Stoneham *v.* 237
Odell *v.* Cormack 223
Official Receiver, Ex parte. In re Gould (C. A.) 92
———————, Ex parte. In re Reed, Bowen, & Co (C. A.) 174

P.

Palliser *v.* Gurney 519
Parkers, In re. Ex parte Sheppard 84
Partridge, Ex parte (C. A.) 467
Passmore, Barnacott *v.* 75
Pendleton (Overseers of), Taylor *v.* 288
Phillips, Ex parte. In re Watson (C. A.) 234
Poole (Mayor, &c., of), Reg. *v.* 602
———————————— 683
Priester, Tuck *v.* 48
———, ——— *v.* (C. A.) 629

R.

Reed, Bowen, & Co., In re. Ex parte Official Receiver (C. A.) 174

	PAGE
Reg. *v.* Catley	491
—— *v.* Cuming	13
—— *v.* Hanley (Recorder of)	481
—— *v.* Lloyd (C. C. R.)	213
—— *v.* Midland Railway Company	540
—— *v.* Poole (Mayor, &c., of)	602
—— *v.* Poole (Mayor, &c., of)	683
—— *v.* Robinson	322
—— *v.* St. George's, Southwark (Vestry of)	533
—— *v.* St. Mary, Islington (Assessment Committee of)	529
—— *v.* Southampton (Inhabitants of County of)	590
Reid *v.* Explosives Company (C. A.)	264
Reigate (Guardians of), Guardians of Croydon *v.* (C. A.)	385
River Dee Company, Wenlock (Baroness) *v.* (C. A.)	155
Robertson, In re	1
Robinson, Reg. *v.*	322
Roe *v.* Mutual Loan Fund, Limited (C. A.)	347
Rooke, Kellard *v.*	585
Royal Mail Steam Packet Company *v.* English Bank of Rio de Janeiro	362

S.

St. Andrew's Hospital, Northampton *v.* Shearsmith	624
St. George's, Southwark (Vestry of), Reg. *v.*	533
St. Giles', Camberwell (Vestry of) *v.* Board of Works for Greenwich District	502
St. Mary, Islington (Assessment Committee of), Reg. *v.*	529
Salvage Association, Johnston *v.* (C. A.)	458
Sayer, Ex parte. In re Mansel (C. A.)	679
Schulze *v.* Great Eastern Railway Company (C. A.)	30
Scovell *v.* Bevan	428
Seton *v.* Lafone (C. A.)	68
Shaw, Wight *v.* (C. A.)	396
Shearsmith, St. Andrew's Hospital, Northampton *v.*	624
Sheffield (Mayor, &c., of), Ward *v.*	22
Sheppard, Ex parte. In re Parkers	84
Shrewsbury and Talbot (Earl of), Maple *v.* (C. A.)	463
Southampton (Inhabitants of County of), Reg. *v.*	590
South-Eastern Division of Essex, In re Election Petition for	252
South Staffordshire Waterworks Company *v.* Stone	168
Stainton, In re. Ex parte Board of Trade	182
Stephenson, Murray *v.*	60
Stevens *v.* Bishop	442
Stokes *v.* Stokes	62
—— *v.* —— (C. A.)	419
Stone, South Staffordshire Waterworks Company *v.*	168
Stoneham *v.* Ocean, Railway, and General Accident Insurance Company	237
Strickland, Watson *v.* (C. A.)	391
Suttill, Hounsell *v.*	498

T.

Tasker, Beckett *v.*	7
Taylor, Crofts *v.*	524
—— *v.* Overseers of Pendleton	288
Thomas, Calvert *v.* (C. A.)	204
—— *v.* Mirehouse	563
Todd, Ex parte. In re Ashcroft (C. A.)	186
Tonsley *v.* Heffer	153
Tuck *v.* Priester	48
—— *v.* —— (C. A.)	629
Tuff, In re. Ex parte Nottingham	88
Tunnicliffe *v.* Overseers of Birkdale	280

PAGE

U.

United Kingdom Mutual Steamship Assurance Association *v.* Nevill (C. A.) 110

W.

Ward *v.* Mayor, &c., of Sheffield 22
Watson, In re. Ex parte Phillips (C. A.) 234
——— *v.* Strickland (C. A.) 391
Weldon *v.* Neal (C. A.) 394
Wenlock (Baroness) *v.* River Dee Company (C. A.) 155
White *v.* Bywater 582
Wight *v.* Shaw (C. A.) 396
Wilson *v.* Glossop 379
Witt *v.* Banner 276

Y.

Yarmouth *v.* France 647

TABLE OF CASES CITED.

A.

		PAGE
Adamson, Ex parte	8 Ch. D. 807	69, 85, 86, 87
Agricola, The	2 Wm. Rob. 10	450, 451, 452, 456
Angell *v.* Felgate	7 H. & N. 396	297
Arnitt *v.* Garnett	3 B. & A. 440	565
Attorney General *v.* Campbell	Law Rep. 5 H. L. 524	407, 415, 416
——— *v.* Jackson	2 Cl. & F. 48	408
——— *v.* Napier	6 Ex. 217	409
——— *v.* Sillen	10 H. L. C. 704	140
Attorney General for Quebec *v.* Reed	10 App. Cas. 141	183
Auckland (Earl of)	Lush. 164	451

B.

Bailey, Ex parte	Law Rep. 13 Eq. 314	192
Bainbridge *v.* Pickering	2 Wm. Bl. 1325	510
Baines *v.* Bromley	6 Q. B. D. 691	398, 399
———, Re	1 Cr. & P. 31.	314, 320
Baker *v.* Thorogood	2 Curt. Eccl. Rep. 632	313, 315, 320
Bann River Navigation Act, 1879, In re Ex parte Oliperts	17 Law Rep. Ir. 168	3, 6
Barnes *v.* Toye	13 Q. B. D. 410	510, 511
Barnewall, Ex parte	6 D. M. & G. 795	85
Beal, Ex parte	Law Rep. 3 Q. B. 387	51, 635
Berdan *v.* Greenwood	3 Ex. D. 251	172, 173, 465, 466
Berkley *v.* Watling	7 A. & E. 29	337
Beven *v.* Bank of United States	4 Wharton, 300	366
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	459, 461, 162
Birmingham Gas Company *v.* Ratcliffe	Law Rep. 6 Ex. 224	297
Black *v.* Coltness Iron Company	6 App. Cas. 315	443
Blackburn Benefit Building Society, In re	24 Ch. D. 421	162
Blackburn and District Benefit Society *v.* Cunliffe, Brooks, & Co.	22 Ch. D. 61	160, 162, 165
Blaiberg *v.* Beckett	18 Q. B. D. 96	141, 206
Blake *v.* Shaw	Johns. 732	658
Blamires *v.* Lancashire and Yorkshire Railway Company	Law Rep. 8 Ex. 283	427
	5 Bing. N. C. 231	510
Brayshaw *v.* Eaton	3 Taunt. 130	233
Bridges *v.* Berry		

		PAGE
Brocklehurst *v.* Railway Printing and Publishing Company	W. N. 1884, 70	277, 569
Browne, Ex parte	16 Ch. D. 497	176
Bryant *v.* Reading	17 Q. B. D. 128	140
Buckland *v.* Johnson	15 C. B. 145	234
Burghart *v.* Hall	4 M. & W. 727	510
Burrough *v.* Philcox	5 My. & Cr. 72	328
Butler *v.* Turley	2 C. & P. 585	221
——— *v.* Wildman	3 B. & Ald. 398	373

C.

Calcutta Jute Mills Company *v.* Nicholson	1 Ex. D. 428	403, 404, 412, 417
Calder *v.* Dobell	Law Rep. 6 C. P. 486	230
Caldwell *v.* Pagham Harbour Reclamation Company	2 Ch. D. 221	28
Caledonian Railway Company *v.* Greenock and Wemyss Bay Railway Company	Law Rep. 2 H. L., Sc. 347	542, 543, 545, 546, 547, 549
Calvert *v.* Joliffe	2 B. & A. 418	564
Carlon *v.* Kenealy	12 M. & W. 139	514
Carr *v.* London and North Western Railway Company	Law Rep. 10 C. P. 307	69, 70, 71, 73, 74
Cassel *v.* Lancashire and Yorkshire Accident Insurance Company	1 Times Law Reports, 495	238
Cawley *v.* National Employers Accident and General Assurance Association	1 Cababé & Ellis, 597	238
Cesena Sulphur Company *v.* Nicholson	1 Ex. D. 428	403, 404, 412, 417
Chambers, Ex parte	2 M. & A. 464	572
Champneys *v.* Buchan	4 Drew. 104	435
Cigala's Settlement Trusts, In re	7 Ch. D. 351	409
Clarapede *v.* Commercial Union	32 W. R. 151	395
Clark, Ex parte	13 Q. B. D. 426	35
Clarke *v.* Holmes	7 H. & N. 937	425, 647
Cleaver, In re	18 Q. B. D. 489	205
Clow *v.* Harper	3 Ex. D. 198	297, 298, 299, 300, 302
Cocker *v.* Musgrove	9 Q. B. 223	565
Colyer *v.* Speer	2 Brod. & B. 67	565
Consolidated Credit Corporation *v.* Gosney	16 Q. B. D. 24	205
Cook *v.* North Metropolitan Tramways Company	18 Q. B. D. 683	649, 668
Cooke *v.* Newcastle Water Company	10 Q. B. D. 332	158
Cooper, Ex parte	2 Ch. D. 255	175
——— *v.* London, Brighton, and South Coast Railway Company	4 Ex. D. 88	66
Cork and Youghal Railway Company In re	Law Rep. 4 Ch. 748	163
Cory *v.* Bristow	Law Rep. 10 C. P. 504; 2 App. Cas. 262	292, 295
Coventry *v.* Great Eastern Railway Company	11 Q. B. D. 776	69, 71, 73
Cox *v.* Kitchin	1 B. & P. 338	380
Crofts *v.* Beale	11 C. B. 172	343, 346
Crosbie, Ex parte	2 M. & A. 397	572
Crosley, Ex parte	1 Dea. 107, 111	572
Culley *v.* Charman	7 Q. B. D. 89	380
Cumberland, In re. Ex parte Worthington	3 Ch. D. 803	230

		PAGE
Cummins *v.* Birkett	3 H. & N. 156	297
Currie *v.* Misa	Law Rep. 10 Ex. 153	342, 343
Curtis, Ex parte	3 Q. B. D. 13	169

D.

Davies *v.* Makuna	29 Ch. D. 596	305
Davis *v.* Burton	11 Q. B. D. 537	141
——, Ex parte. In re Davis	Law Rep 7 Ch. 526	183
Davison, In re	13 Q. B. D. 50	85
Dawson, Ex parte	Law Rep. 19 Eq. 433	191, 192, 193, 199
—— *v.* Fox	14 Q. B. D. 377	140, 144, 145
Dean *v.* Green	8 P. D. 79	313, 315, 320
D'Epineuil, In re	20 Ch. D. 217	94
De la Rosa *v.* Prieto	16 C. B. (N.S.) 578	304, 306
Dickson *v.* Reuter's Telegram Company	3 C. P. D. 1	69
District Bank of London, Ex parte	16 Q. B. D. 700	89
Ditton, Ex parte	11 Ch. D. 56	176
Dixon *v.* Baldwen	5 East, 175	559
Dobbs *v.* Grand Junction Waterworks Company	9 Q. B. D. 151; 10 Q. B. D. 337; 9 App. Cas. 49	443, 445, 446
Dodds *v.* Shepherd	1 Ex. D. 75	140
Donaldsons *v.* Becket	4 Burr. 2408	51
Doyle *v.* Kaufman	3 Q. B. D. 7	395
Drake *v.* Mitchell	3 East, 251	230, 232, 233
Draycott *v.* Harrison	17 Q. B. D. 147	9, 10
Drew *v.* Drew	1 Notes of Eccl. Cas. 315	380, 382
Duncan *v.* Cashin	Law Rep. 10 C. P. 554	570
Dunkirk Colliery Company *v.* Lever	9 Ch. D. 20	158

E.

Edmonton (Guardians of) *v.* Guardians of St. Mary, Islington	15 Q. B. D. 95, 339	387
Electric Telegraph Company *v.* Overseers of Salford	11 Ex. 181	292, 295
Emma Silver Mining Company *v.* Grant	17 Ch. D. 122	87
Engelback *v.* Nixon	Law Rep. 10 C. P. 645	570
English Joint Stock Bank, In re	Law Rep. 3 Eq. 341	265
Exeter (Bishop of) *v.* Starr	2 Lev. 36	313

F.

Fawcus *v.* Charlton	10 Q. B. D. 517	61
Foreman, Ex parte. In re Hann	18 Q. B. D. 393	183
Foster *v.* Green	6 H. & N. 793	151, 152
—— *v.* Hilton	1 Dowl. 35	564
—— *v.* Redgrave	Law Rep. 4 Ex. 35	510
Freeman *v.* Cook	2 Ex. 654	69
Fripp *v.* Chard Railway Company	11 Hare, 241	266
Furber *v.* Cobb	18 Q. B. D. 494	111, 205, 392

G.

G. *v.* H.	W. N. (1883), 233	61
Gamble *v.* Accident Assurance Company	Ir. Rep. 4 C. L. 204	238

		PAGE
Gardner *v.* London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	265
Garnett *v.* Bradley	3 App. Cas. 944	63, 420
———, In re. Ex parte Bullock	16 Q. B. D. 698	40, 41, 43, 47
German Mining Company, In re	4 D. M. & G. 19	163
Gibson *v.* Mayor of Preston	Law Rep. 5 Q. B. 218	604, 608
Giles *v.* Melsom	Law Rep. 6 H. L. 24	278, 279
Golding, Davis, Ex parte	13 Ch. D. 628	557
Goldsmid *v.* Cazenove	7 H. L. C. 785	87
Goldstrom *v.* Tallerman	18 Q. B. D. 1	141
Good *v.* London Steamship Owners Association	Law Rep. 6 C. P. 563	244, 245, 246, 248, 250
Goodwin *v.* Budden	42 L. T. Rep. (N.S.) 536	297
Govier *v.* Hancock	6 T. R. 603	380, 383
Grent *v.* Norway	10 C. B. 665	337
Graves' Case	Law Rep. 4 Q. B. 715	632, 634, 636, 641
Great Western Railway Company *v.* Halesowen Railway Company	52 L. J. (Q.B.) 473	543, 548, 552
——— *v.* McCarthy	12 App. Cas. 218	66
——— *v.* Redmayne	Law Rep. 1 C. P. 329	31
——— *v.* Waterford and Limerick Railway Company	17 Ch. D. 493	542, 543, 547, 551
Green *v.* Austin	3 Camp. 260	564
Griffiths *v.* Earl of Dudley	9 Q. B. D. 357	360
——— *v.* London and St. Katharine Dock Company	12 Q. B. D. 493; 13 Q. B. D. 259	665, 666

H.

Haffield *v.* Mackenzie	10 Ir. C. L. R. 289	305, 306
Hall *v.* Derby Sanitary Authority	16 Q. B. D. 163	81
Hampstead Vestry *v.* Cotton	16 Q. B. D. 475	506
Hanna, The	Law Rep. 1 A. & E. 283	451
Harris *v.* Morris	4 Esp. 41	380, 384
Harrison *v.* Bank of Australasia	Law Rep. 7 Ex. 39	371
Hartnall *v.* Ryde Commissioners	4 B. & S. 361	604
Hayn *v.* Culliford	3 C. P. D. 410	244
Headington Union, Guardians of *v.* Guardians of St. Olave's Union	13 Q. B. D. 293	387
Henchett *v.* Kimpson	2 Wils. 140	564
Hewison *v.* Negus	16 Beav. 594	9
Hewson *v.* Heard	9 B. & C. 754	192
Higinbothan *v.* Holme	19 Ves. 88	675
Hitchin *v.* Campbell	2 W. Bl. 778	579
Hoch *v.* Boor	49 L. J. (Q. B.) 665	297
Hoile *v.* Scales	2 Hagg. Eccl. Rep. 566	315
Hole *v.* Bradbury	12 Ch. D. 886	51
Holmes *v.* Penney	3 K. & J. 90	328, 329, 330, 332
Hope *v.* Hope	1 Sw. & Tr. 94	382, 383
Hudson *v.* Tooth	2 P. D. 125	315, 319
Hughes *v.* Buckland	15 M. & W. 346	354, 356
Hunt *v.* De Blaquiere	5 Bing. 550	380, 381
Hynd *v.* Spowart	22 Scottish Reporter, 702	360

		PAGE
I.		
Imperial Continental Gas Association *v.* Nicholson	37 L. T. 717	403
J.		
Jefferys *v.* Boosey	4 H. L. C. 815	51, 54, 55, 56, 634, 640
Jefferyes *v.* Smith	1 Jac. & W. 298	266
Job *v.* Langton	6 E. & B. 779	366, 371, 377
Johnson *v.* Credit Lyonnais Company	3 C. P. D. 32	69
Jones *v.* Curling	13 Q. B. D. 262	397
—— *v.* Llynvi Colliery Company	Not reported	360
K.		
Kemp *v.* Halliday	6 B. & S. 723	366
Kendal *v.* Marshall Stevens	11 Q. B. D. 356	556, 559
Kendall *v.* Hamilton	4 App. Cas. 504	228, 230, 232, 233
Kent *v.* Worthing Local Board	10 Q. B. D. 118	605, 608
Keynsham Union *v.* Bedminster Union	3 Q. B. D. 344	387
Kidston *v.* Empire Marine Insurance Company	Law Rep. 8 C. P. 535	460
King *v.* Hoare	13 M. & W. 494	228, 230, 232, 233
—— *v.* Lucas	23 Ch. D. 712	9
Kingsbridge Union, Guardians of *v.* Guardians of East Stonehouse	18 Q. B. D. 528	387, 389, 391
Kirk *v.* Blurton	9 M. & W. 284	226
Knatchbull *v.* Hallett	13 Ch. D. 696	162
L.		
Lancashire Telephone Company *v.* Overseers of Manchester	13 Q. B. D. 700; 14 Q. B. D. 267	292, 295
Laurie *v.* Douglas	15 M. & W. 746	244
Laws *v.* Eltringham	8 Q. B. D. 283	218, 222
Lax *v.* Corporation of Darlington	5 Ex. D. 78	656
Leman *v.* Houseley	Law Rep. 10 Q. B. 66	305, 306
Leslie, Ex parte	18 Q. B. D. 619	176
Lion Insurance Association *v.* Tucker	12 Q. B. D. 176	114, 115
Liverpool, Guardians of, *v.* Overseers of Portsea	12 Q. B. D. 303	387
Lloyds, The, or Sea Queen	Brown and Lush. 359	450, 456
Lohre *v.* Aitchison	4 App. Cas. 755	460
Longdill *v.* Jones	1 Stark. 345	578
London and North Western Railway Company *v.* Bartlett	7 H. & N. 400	560
Lord *v.* Bunn	2 Y. & Coll. C. C. 98	329, 332
Loughborough Highway Board *v.* Curron	16 Q. B. D. 565; 17 Q. B. D. 344	604, 608
Lumley *v.* Simmons	55 L. J. (Ch.) 579	205
M.		
McAndrews *v.* Thatcher	3 Wallace, 347	374
McHenry, Ex parte	24 Ch. D. 35	674
Mac, The	Law Rep. 7 P. D. 126	201

		PAGE
Mackalley's Case	9 Rep. 69 b.	76
Maggi, In re	20 Ch. D. 545	94, 97
Maidstone Union, Guardians of, *v.* Guardians of Holborn Union	17 Q. B. D. 817	386, 387, 389, 391
Mainwaring *v.* Leslie	M. & M. 18	380
Manby *v.* Scott	1 Keble, 69	380, 381
Manchester, Sheffield, and Lincolnshire Railway Company *v.* Brown	8 App. Cas. 703	65
Marchant *v.* Lee Conservancy Board	Law Rep. 9 Ex. 60	534, 536, 537
Marsh *v.* Higgins	9 C. B. 551	192
Martin *v.* Fyfe	49 L. T. (N.S.) 107	297, 299
Mayall *v.* Higbey	1 H. & C. 148	51
Merchant Banking Company of London *v.* Phœnix Bessemer Steel Company	5 Ch. D. 205	69
Mersey Docks and Harbour Board *v.* Lucas	8 App. Cas. 891	443
Mersey Docks Case	11 H. L. C. 443	281, 282, 283, 284
Mersey Steamship Company *v.* Shuttleworth	11 Q. B. D. 531	398
Mile End Vestry of *v.* Whitechapel Union	1 Q. B. D. 680	506
Miles, Ex parte	15 Q. B. D. 39	556, 559, 562
—— *v.* New Zealand Alford Estate Company	32 Ch. D. 266	342, 343, 346
Millar *v.* Taylor	4 Burr. 2303	51
Miller *v.* Pilling	9 Q. B. D. 736	158
Milward *v.* Midland Railway Company	14 Q. B. D. 68	586, 589
Milroy *v.* Lord	4 D. F. & J. 264	189, 193
Misa *v.* Currie	Law Rep. 10 Ex. 153	230
Montague *v.* Benedict	3 B. & C. 631	381
Moon *v.* Durden	2 Ex. 22	192
Moore *v.* Magan	16 M. & W. 95	314
—— *v.* Lambeth Waterworks Company	17 Q. B. D. 462	605, 608
—— *v.* Moore	Law Rep. 18 Eq. 483	190
——, Sir John, Mining Company, In re	W. N. 1878, p. 87	215
Moran *v.* Jones	7 E. & B. 523	365, 366, 367, 371, 377, 378
Morison *v.* Moat	9 Hare, 241	639
Morton *v.* Faran	1 B. & P. 226	380
Mountford, Lord *v.* Lord Cadogan	19 Ves. 633	86, 87

N.

Nelson *v.* Belmont	5 Duer. 310	366
New University Club, Re the Duty on	18 Q. B. D. 720	617
Notara *v.* Henderson	Law Rep. 7 Q. B. 225	367, 375, 376
Novello *v.* Sudlow	12 C. B. 177	633

O.

O'Brien *v.* Brodie	Law Rep. 1 Ex. 302	286
Odell, Ex parte, In re Walden	10 Ch. D. 76	514
Official Receiver, Ex parte, In re Morritt	18 Q. B. D. 222	141, 205, 206, 207, 208, 209
Ohrby *v.* Ryde Commissioners	5 B. & S. 743	605
Oldershaw *v.* King	2 H. & N. 399	342, 344, 346
Oriental Bank Corporation, In re. Mac Dowall's Case	32 Ch. D. 366	265

		PAGE
P.		
Packinton *v.* Culliford	1 Roll. Abr. 921	578
Palgrave *v.* Windham	1 Str. 212	564
Palmer *v.* Moore	9 B. & C. 754	192
Parker, In re	29 Ch. D. 199	2, 3, 4, 5
——— *v.* Lord Clive	4 Burr. 2419	16
Parsons *v.* St. Matthew, Bethnal Green	Law Rep. 3 C. P. 56	604
Paterson *v.* Wallace	1 Macq. 748	649
Patscheider *v.* Great Western Railway Company	3 Ex. D. 153	66
Patton *v.* Employers' Liability Assurance Corporation	20 L. R. Ir. 93	238
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 473	65
Perkinson *v.* Gilford	Cro. Car. 539	578
Pickard *v.* Sears	6 A. & E. 474	351
Pike *v.* Fitzgibbon	17 Ch. D. 454	9
Player, In re	54 L. J. (Q.B.D.) 553	191, 192, 193, 194
Powell *v.* Rees	7 A. & E. 426	579
Prince Albert *v.* Strange	2 De G. & Sm. 652	51, 634
Pyman *v.* Burt	1 Cababé & Ellis, 207	336, 339
R.		
Reed *v.* Harvey	5 Q. B. D. 184	183
Reg. *v.* Bloomsbury County Court, Judge of	17 Q. B. D. 788	169
—— *v.* Bridgnorth, Guardians of	9 Q. B. D. 765; 11 Ibid. 314	387, 389
—— *v.* Christopherson	16 Q. B. D. 7	435, 436
—— *v.* Civil Engineers, Institution of	5 Q. B. D. 48	617, 618, 619, 621, 623, 624
—— *v.* Goodchild	E. B. & E. 2	443
—— *v.* Kettle	17 Q. B. D. 761	211
—— *v.* Larkin	23 L. J. (M.C.) 125	607
—— *v.* Mount	6 P. C. 283	21
—— *v.* New River Co.	4 Q. B. D. 309	531, 53
—— *v.* Poplar Union, Assessment Committee of	13 Q. B. D. 364	531, 532
—— *v.* Prestney	3 Cox, 505	218
—— *v.* St. Mary, Bermondsey, Overseers of	14 Q. B. D. 351	531
—— *v.* St. Pancras Assessment Committee	2 Q. B. D. 581	292
—— *v.* Sheffield	Law Rep. 6 Q. B. 652	23
—— *v.* Sill	22 L. J. (M.C.) 41	607
—— *v.* Southend County Court Judge of	13 Q. B. D. 142	429, 430
—— *v.* Stanley	11 Add. & E. 869	500, 501
—— *v.* Thorogood	12 Ad. & E. 183	315, 319
—— *v.* West Derby	Law Rep 10 Q. B. 283	281, 282, 283, 284
Rex *v.* Bucks	12 East, 192	597
—— *v.* Flintan	1 B. & Ad. 227	383
—— *v.* Glamorgan, Inhabitants of	2 East, 356	601
—— *v.* Kent	2 M. & S. 513	597, 601
—— *v.* St. Benedict	4 B. & A. 447	597
—— *v.* S. Giles, Cambridge	5 M. & S. 260	603

		PAGE
Rex *v.* St. George, Hanover Square	3 Camp. 222	603, 604
—— *v.* Wandsworth	1 B. & A. 63	599
—— *v.* West Riding of Yorkshire	2 East, 342	597, 598, 601
Richards *v.* Delbridge	Law Rep. 18 Eq. 11	190
Richardson *v.* Jenkins	1 Dr. 477	86
Riseley *v.* Ryle	11 M. & W. 16	565
Roberts *v.* Roberts	13 Q. B. D. 794	277, 279, 280
Robertson *v.* Howard	3 C. P. D. 280	61
Robinson *v.* Gosnold	6 Mod. 171	380, 381
——— *v.* Tucker	14 Q. B. D. 371	140
Rosevear China Clay Company, Ex parte	11 Ch. D. 560	557, 560, 562
Ross *v.* Army and Navy Hotel Company	34 Ch. D. 43	569, 570, 571
Rusden *v.* Pope	Law Rep. 3 Ex. 269	570
Ryder *v.* Wombwell	Law Rep. 3 Ex. 90; Law Rep. 4 Ex. 32	510, 511

S.

Salaman, Ex parte	14 Q. B. D. 936	193
Scarf *v.* Jardine	7 App. Cas. 345	230
Searle *v.* Matthews	Weekly Notes, 1883, p. 176	77, 97
Seaver *v.* Seaver	2 Sw. & Tr. App. 2	382
Selby, Ex parte. In re Selby	2 Jur. (N.S.) 29	185
Shakespear, In re. Deakin *v.* Larkin	30 Ch. D. 169	519, 520, 521
Sharp, Ex parte. Re Walker	34 W. R. 550	539
Shaw, &c., *v.* Salford Union	Not reported	292, 294, 295
Sheppard *v.* Bradford	16 C. B. (N.S.) 369	281, 282, 284
Sidebotham, Ex parte	14 Ch. D. 458	176, 177, 178, 179, 180, 181, 184
Simpson *v.* Charing Cross Bank	34 W. R. 568	513, 514
Shortridge *v.* Young	12 M. & W. 5	140, 147
Smith *v.* Baker	Law Rep. 8 C. P. 350	348, 350, 351, 579
—— *v.* Goss	1 Camp. 282	559
—— *v.* Lambeth Assessment Committee	9 Q. B. D. 585	292
—— *v.* West Derby Local Board	38 L. T. (N.S.) 716	605
Southam, Ex parte. In re Southam	Law Rep. 17 Eq. 578	514
Stanford, Ex parte. In re Barber	17 Q. B. D. 259	141, 205, 209, 392
Steel *v.* State Line Steamship Company	3 App. Cas. 72	244
Steward *v.* North Metropolitan Tramway Company	16 Q. B. D. 178	395
Stott *v.* Fairlamb	52 L. J. (Q.B.D.) 420	342
Suche, Joseph, & Co., In re	1 Ch. D. 48	192
Sulley *v.* Attorney General	5 H. & N. 711	404, 411, 417
Surtees *v.* Ellison	9 B. & C. 750	192
Svendsen *v.* Wallace	13 Q. B. D. 69	366, 371
Swan *v.* North British Australasian Company	2 H. & C. 175	70, 71

T.

Tattersall *v.* National Steamship Company	12 Q. B. D. 297	244
Thomas *v.* Quartermaine	18 Q. B. D. 685	425, 426, 437, 428, 648, 649, 650, 653, 654, 656, 657, 659, 660, 661, 662, 663, 666, 667, 678

		PAGE
Thomson *v.* Advocate General	12 Cl. & F. 1	408, 416
Thorman *v.* Burt	54 L. T. 349	337
Tildesley *v.* Harper	10 Ch. D. 393	395
Turner *v.* Bridgett	9 Q. B. D. 55	140
——— *v.* Reynall	14 C. B. (N.S.) 328	304, 306
——— *v.* Robinson	10 Ir. Ch. Rep. 510	51, 632

U.

Union Bank of London *v.* Lenanton	3 C. P. D. 243	201, 203

V.

Valieri *v.* Boyland	Law Rep. 1 C. P. 382	337
Veale *v.* Automatic Boiler Feeder Company	18 Q. B. D. 631	60
Vertue *v.* Lord Clive	4 Burr. 2472	16, 17

W.

Walker *v.* Bunkell	22 Ch. D. 722	158
———, Ex parte. In re McHenry	22 Ch. D. 813	183
Wallace *v.* Attorney General	Law Rep. 1 Ch. 1	408, 411
Wallis, In re	14 Q. B. D. 950	104
Walthew *v.* Mavrojani	Law Rep. 5 Ex. 116	366, 367, 377
Walton *v.* Edge	10 App. Cas. 33	162
Ward *v.* Pilley	5 Q. B. D. 427	297, 299
Warkworth, The	9 P. D. 20	243, 246
Waterhouse *v.* Gilbert	15 Q. B. D. 569	140, 145, 149, 150
Watkins *v.* Evans	18 Q. B. D. 386	141, 205, 206, 207, 209
Watson, Ex parte. In re Love	5 Ch. D. 35	557, 559
Webb *v.* Shaw	16 Q. B. D. 658	140
Wesley, The	Lush. 268	450
West *v.* Hedges	1 Barnes' Notes of Cases, 211.	564
Wharton *v.* Naylor	12 Q. B. 673	565
Whinney, Ex parte	17 Q. B. D. 238	35, 36, 36, 675
Whitaker, In re Christian *v.* Whitaker	34 Ch. D. 227	10
Whitehead *v.* Anderson	9 M. & W. 518	561
Willey, Ex parte	23 Ch. D. 118	36, 183
Willoughby *v.* Backhouse	2 B. & C. 821	348
Wilson *v.* Lancashire and Yorkshire Railway Company	9 C. B. (N.S.) 632	31, 32
——— *v.* Merry	Law Rep. 1 Sc. App. 326	425
Winch *v.* Conservators of the Thames	Law Rep. 9 C. P. 378	656
Winston, The	9 P. D. 85	452
Withernsea Brickworks, In re	16 Ch. D. 337	94
Witt *v.* Parker	46 L. J. (Q.B.) 450	140
Woodley *v.* Metropolitan District Railway Company	2 Ex. D. 384	649, 662, 663, 666, 668
Woodward *v.* Dowse	10 C. B. (N.S.) 722	380
Writers to the Signet (The Society of) *v.* Commissioners of Inland Revenue	14 Rett. 34	618

Y.

Young *v.* Davis	2 H. & C. 197	604, 608
——— *v.* Hughes	4 H. & N. 76	192

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

L VICTORIÆ.

IN RE ROBERTSON.

1887
March 15.

Solicitor and Client—Costs—Non-contentious Business—Advances on Security of Real Property—"Perusing" Title-deeds — Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order of August*, 1882, *Sched. II.*

A solicitor making advances to a client upon the security of real property and perusing for that purpose the title-deeds of such property, is not entitled to charge at the rate of 1*s.* per folio "for perusing" under the 2nd schedule of the General Order of August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44).

APPEAL from the decision of a judge at chambers reversing the Master's taxation of a bill of costs.

It appeared that one Sparks instructed Mr. C. H. de G. Robertson, a solicitor, to obtain a mortgage for 1200*l.* upon certain real property. Pending the completion of the transaction Robertson made advances on the security of the property to be mortgaged. The mortgage having been executed, Robertson delivered a bill of costs containing several items for perusing title-deeds and other documents, the charges being at the rate of 1*s.* per folio. On taxation the master allowed 4*d.* per folio in respect of the perusal of these documents, as instructions for drawing the

1887

IN RE ROBERTSON.

abstract of title. Robertson having applied for a review of taxation, Huddleston, B., ordered the taxation to be reviewed upon the basis of allowing 1*s.* per folio for the perusal.

A. J. David, for the appellant. The solicitor claims to charge at the rate of 1*s.* per folio under the 2nd schedule of the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44) (1), but it is submitted that the charge there allowed "for perusing" does not include the perusal of every document which a solicitor, in the ordinary course of his business from day to day, has to read. The high charge of 1*s.* per folio shews that the framers of the Order contemplated a service requiring skill and involving responsibility, and it must be taken that the words are confined to the perusal of new and original documents drawn by the solicitor on one side and perused before execution by the solicitor on the other side. The words "drawing," "engrossing," "fair copying," and "perusing," in fact apply to the same documents. In *In re R. A. Parker and Others* (2), Chitty, J., decided that abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is fixed by the General Order at 1*s.* per folio, and it would be absurd that a charge which is not

(1) The 2nd Schedule of the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), is, so far as material, as follows :—

"SCHEDULE II.

"Instructions for and drawing and perusing deeds, wills, and other documents.

"Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable.

"In ordinary cases as to drawing, &c., the allowance shall be

For drawing . .	2*s.* per folio.
For engrossing .	8*d.* „
For fair copying .	4*d.* per folio.
For perusing . .	1*s.* „

"Attendances.

"In ordinary cases . . . 10*s.*

"In extraordinary cases the taxing master may increase or diminish the above charges, if for any special reasons he shall think fit.

"Abstracts of Title (where not covered by the above scales).

	s.	*d.*
Drawing each brief sheet of 8 folios	6	8
Fair copy	3	4

"In extraordinary cases the taxing master may increase or diminish the above allowance if for any special reasons he shall think fit."

(2) 29 Ch. D. 199.

allowed for perusing an abstract of title should be allowed for the perusal of the original title-deeds of much greater length. In the Irish case of *In re River Bann Navigation Act*, 1879, *Ex parte Olpherts* (1) it was held that the words "drawing and perusing" (the Irish General Order being substantially the same as the English) applied to the same document, and that the fee of 1*s.* per folio for perusing deeds did not apply to any other conveyancing matter.

Lambert, for the respondent. *In re Parker and Others* (2) is not in point. In that case the charge was for perusal of an abstract of title, and the 2nd Schedule contains a special heading dealing with "abstracts of title." The question there raised was whether the term "other documents" included abstracts of title, and the judgment of Chitty, J., turned entirely on this point. In this case the documents perused come within the heading "perusing deeds, wills, and other documents," and therefore on the plain wording of the Order a charge of 1*s.* per folio is allowed for their perusal.

David, in reply.

DAY, J. I think this appeal must be allowed. It appears that the respondent was solicitor for a client who was desirous of mortgaging property, and that he made advances to his client on the property eventually mortgaged. On the occasion of making those advances he looked at documents constituting his client's title, and perused amongst other documents a will and policies of insurance upon the life of the client. Eventually the mortgage was executed to the mortgagee, and a bill of costs was then sent in by the respondent to his client containing charges for perusing the documents I have mentioned at the rate of 1*s.* per folio. If I understand the practice of the Courts previous to the passing of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), that is not the rate which would have been allowed previous to that Act. Is, then, the solicitor entitled to make the charge under that Act? The 1st section provides for the making of a General Order for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases,

(1) 17 L. Rep. Ir. 168.

(2) 29 Ch. D. 199.

1887

IN RE ROBERTSON.

Day, J.

mortgages, settlements, and other matters of conveyancing. In pursuance of this section a General Order was made in August, 1882, the material part of which is as follows:—

"SCHEDULE II.

"Instructions for and drawing and perusing deeds, wills, and other documents.

"Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable.

"In ordinary cases, as to drawing, &c., the allowance shall be:—

For drawing	2*s.*	per folio.
„ engrossing	8*d.*	„
„ fair copying.	4*d.*	„
„ perusing	1*s.*	„"

If it was the intention of those who made this order that the charge of 1*s.* allowed "for perusing" should be allowed for a mere perusal of documents of title, such as has taken place in this case, it seems to me that the charge might with much greater justice be made for perusing abstracts of title. But in the case of *In re R. A. Parker and Others* (1), Chitty, J., decided that abstracts of title are not within the operation of that part of the Order which I have read, but that the old scale of 6*s.* 8*d.* for perusal of every three brief sheets of eight folios each remains unaltered. It is argued that this is not a case of the perusal of an abstract of title, but I cannot see why a solicitor should be allowed 1*s.* a folio for perusing a will and policies of insurance containing, as they do, very voluminous conditions, when he is not allowed to make that charge for perusing abstracts of the same documents. Very little care and labour are required in perusing a will for the purpose for which these papers were perused in the present case. If the object is merely to ascertain whether a person is entitled to a legacy, all that is necessary is to skim through the document to see that there is nothing inconsistent with such legacy, and it is idle to say that a charge of 1*s.*

(1) 29 Ch. D. 199.

per folio is a fair and reasonable charge for the skill and labour required. In the same way in a policy of insurance, there are a number of conditions which are common to all such documents. The Order we have to construe, as I read it, says: "In ordinary cases, as to drawing, &c."—that is, as to drawing and that which follows drawing—"the allowance shall be, for drawing 2*s.* per folio; for engrossing,"—that is, as I read it, for engrossing the document which has been drawn—"8*d.* per folio; for fair copying"—that is, for fair copying that document—4*d.* per folio. So far the interpretation is, I think, plain; but then it is said that the words, "for perusing," mean "for perusing other documents." I do not so read the order. I construe the words as meaning "for perusing that document." What has the solicitor, instructed by the other party concerned in the business, to do? He has to read the document which has been drawn and fair copied in a very different way from that in which it is usually necessary to peruse documents of title. He has to examine it with the most watchful care and anxiety in order to see that there is in it no provision inimical to the interests of his client, and for this service he is very properly allowed to make a charge of 1*s.* per folio. I think that the Master was quite right in refusing to allow it upon the taxation of the costs.

WILLS, J. I am of the same opinion, and entirely agree with my Brother Day. To allow a charge of 1*s.* per folio for every perusal of documents which becomes necessary in the course of a solicitor's business would be, in my opinion, unreasonable. It is a matter of considerable consequence, and it is desirable that there should be uniformity of practice with respect to it. If I thought that the decision at which we have arrived was inconsistent with the decision of Chitty, J., in *In re Parker and Others* (1), I should have desired a further opportunity of considering the matter, and of consulting the Chancery judges, but I do not think that the view we take is in any way inconsistent with the decision of the learned judge in that case, that the words "other documents" in this order do not include abstracts of title. Moreover, it is undesirable that there should be one

(1) 29 Ch. D. 199.

1887

IN RE ROBERTSON.

WILLS, J.

rule with respect to this matter in England and another in Ireland, and I find that in the case of *Re River Bann Navigation Act*, 1879, *Ex parte Olpherts* (1), the Irish Courts took exactly the same view, holding that, under an order to tax the costs awarded to the owner of lands compulsorily taken by a company, his solicitor is not entitled to 1*s.* per folio for perusing deeds referred to in the abstract of title furnished. The General Order pursuant to the Solicitors' Remuneration Act, 1881, discussed in that case is substantially the same as that which we are now discussing, and the Master of the Rolls said with reference to it: "The contention on the part of the solicitor for the vendor, the tenant for life, is that the second schedule includes the reading of all deeds, no matter how numerous, relating to the matter in hand. The contention on the other side is, that the 2nd schedule does not apply to the mere perusal of an old deed, but simply to the case of perusing and approving a new deed or draft deed, the perusal of which requires professional skill or advice, and that it was for that that remuneration was given by Schedule 2;" and at a later period of his judgment: "In my opinion the context plainly shews that in that schedule 'the drawing and perusing' were intended to apply to the same document, and that the fee of 1*s.* for perusing deeds does not apply at all to any other conveyancing matter, the remuneration for which was to be regulated according to the present system." The extravagant consequence that would have resulted in that case from a contrary decision allowing a charge of 1*s.* per folio would have been that the solicitor would have received 19*l.* 15*s.* for perusing a marriage settlement and a mortgage deed, and the learned judge very pointedly remarks: "If that charge be valid and legal, it discloses a very unsatisfactory state of the law, and it is more than questionable whether it ought to be permitted to remain so. For a fee of two or three guineas the services of a competent barrister would be obtained, not for perusing the two deeds only, but for advising on their construction, and, I incline to think, also drafting a further deed, if necessary." By applying the words to documents drawn by an opponent, it is possible to give them a reasonable and a natural construction. In perusing such docu-

(1) 17 L. Rep. Ir. 168.

ments the task of a solicitor is highly responsible, and there is a possibility, if he does not exercise his utmost vigilance, that he may be led to overlook some provision injurious to his client's interest; but there is nothing in the circumstances under which the Solicitors' Remuneration Act, 1881, was drawn to suggest that the framers of the General Order meant that there should be a charge of 1*s.* per folio for the perusal of documents of every description. In my judgment, therefore, the order of the judge must, so far as this point is concerned, be set aside, and the order of the master restored.

Appeal allowed. (1)

Solicitor for appellant: *E. P. James.*

Solicitor for respondent: *C. H. de Grey Robertson.*

(1) Reported by Joseph Smith, Esq.

BECKETT AND ANOTHER *v.* TASKER AND ANOTHER.

March 14.

Husband and Wife—Separate Estate—Post-nuptial Settlement—Restraint upon Anticipation—Contract by Wife during Coverture—Judgment against her after Husband's Death—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *subs-s.* 2–4, *and ss.* 5, 19.

By a post-nuptial settlement, made before the Married Women's Property Act, 1882, property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children. The wife after the Act and during coverture made a promissory note in favour of the plaintiffs, and after the death of the husband the plaintiffs obtained judgment upon the note against the widow and an order for the appointment of a receiver of the rents and profits of the property in settlement:—

Held, that upon the true construction of the Act, ss. 1, 5, and 19, the property in settlement was not liable to satisfy the judgment, and that the order appointing the receiver must be discharged.

APPEAL on behalf of the defendant, Fanny Elizabeth Tasker, widow, against an order of Huddleston, B., refusing to set aside an order of the Master appointing a receiver of the rents and profits of her real estate.

By a post-nuptial settlement, dated March 27, 1882, certain real estate which had by a will of prior date been devised to Mrs. Tasker for her separate use, but without any restraint against anticipation, was conveyed to trustees upon trust to pay

1887

BECKETT v. TASKER.

the rents to the wife for life for her separate use and without power of anticipation, remainder to the husband for life or until bankruptcy, remainder to the children of the marriage.

On July 6, 1885, during the continuance of her coverture, Mrs. Tasker joined in making a joint and several promissory note.

On October 13, 1885, the husband died.

On July 13, 1886, an action was brought in the Mayor's Court upon the note against the makers.

On August 10 judgment was signed in default of appearance, and subsequently the action was removed to the Queen's Bench Division for the purpose of taking out a writ of elegit. On November 22 a writ of elegit was taken out, to which, Mrs. Tasker having effected a mortgage upon the property, a return of nulla bona was made. Mrs. Tasker then applied to the Mayor's Court to vary the judgment by adding the words, "but that as regards the defendant Fanny Elizabeth Tasker the execution thereon be limited to the separate estate of the defendant not subject to any restraint against anticipation," and this amendment having been made the judgment was again varied on the application of the plaintiffs by adding the further words, "unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint."

On January 7, 1887, the plaintiffs made an ex parte application at chambers for the appointment of a receiver of the rents and profits of the property included in the settlement of March 27, 1882. An order by the master, in the terms of the application, was affirmed by Huddleston, B., in chambers. The defendant appealed.

Seward Brice, Q.C. (with him *Yelverton*), for the defendant. The order is bad, and ought to be set aside. The general engagements of a married woman can only be enforced against so much of the separate estate to which she is entitled free from restraint against anticipation at the time when the engagements are entered into as remains at the time when judgment is given, and not against separate estate to which she becomes entitled after the time of the engagements, nor against separate estate to which she is entitled at the time of the engagements subject to a restraint against

anticipation: *Pike* v. *Fitzgibbon*. (1) In *King* v. *Lucas* (2) certain policies of assurance on the life of the husband were by a post-nuptial settlement made in pursuance of ante-nuptial articles assigned to trustees upon trust to receive the money and pay the income to the wife during her life for her separate use without restraint on anticipation. During the life of the husband the wife made promissory notes in favour of the plaintiff, and the plaintiff having, the husband being still alive, brought an action claiming a charge upon the policies, it was held that the trust for separate use did not arise till after the death of the husband, and that as the contract of a married woman can only be enforced against property which forms part of her separate estate at the time of the contract, the action could not be maintained.

There is nothing in the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), to alter the law laid down in those cases so far as the present case is concerned. In *Draycott* v. *Harrison* (3) A. L. Smith, J., says with respect to s. 1, sub-s. 2: "I agree that a married woman is meant to be no more capable of contracting and rendering herself liable upon contracts in respect of her separate property, which is subject to a restraint upon anticipation, than she was before the Act of 1882 was passed."

[DAY, J. Does not s. 1, sub-s. 4, extending the liability of a married woman to "all separate property which she may thereafter acquire," apply?]

The defendant cannot be said to have acquired this property since the contract, within the meaning of the sub-section. Moreover, in *In re Shakespear, Deakin* v. *Lakin* (4), it was held that this sub-section does not enable a married woman who has no existing separate property to bind by a contract any separate property which she may thereafter acquire, the contract referred to being a contract entered into at a time when she has existing separate property. The 19th section only applies to settlements made after the passing of the Act. Lastly, the fact that this is a post-nuptial settlement by the wife of her own estate makes no difference: *Hewison* v. *Negus*. (5)

(1) 17 Ch. D. 454.
(2) 23 Ch. D. 712.
(3) 17 Q. B. D. 147.
(4) 30 Ch. D. 169.
(5) 16 Beav. 594.

1887

BECKETT v. TASKER.

[He also cited *In re Whitaker, Christian* v. *Whitaker*. (1)]

Harper, for the plaintiffs. The order appointing a receiver was rightly made. On the death of the husband the restraint on anticipation came to an end, and from that time the widow held the property as a feme sole, and it is liable under s. 1, sub-ss. 2 and 4 of the Act of 1882, to satisfy this judgment. *Draycott* v. *Harrison* (2) was an application for an order of committal under s. 5 of the Debtors Act, and, as the liberty of the subject was in question, the Act was construed as strictly as possible in favour of the debtor. That case, however, is not in point because there the husband was still alive, and the property did not come into possession until his death. By s. 5 "every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid, as her separate property all real and personal property, the title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act."

Again, the property being left to the defendant for her separate use, there was no consideration for the settlement, and it was void as against the plaintiff.

Seward Brice, Q.C., was not called upon to reply.

DAY, J. I am of opinion that the order appointing the receiver must be set aside. It is admitted that, independently of the Act of 1882, and subject to the question as to the validity of the settlement, this property would not have been liable under a contract entered into by the defendant during her coverture. As the law stood before the Act, the death of the husband would not have in any way affected the liability of the wife under such a contract, and I do not think that the law has been altered in this respect by any of the provisions of the Married Women's Property Act, 1882. The effect of s. 1, sub-s. 4, is, in my judgment, that a contract entered into by a married woman binds not only the separate property she is possessed of at the date of the contract, but also all separate property thereafter acquired during the coverture, but the property in this case is not separate property of which the defendant was possessed at

(1) 34 Ch. D. 227. (2) 17 Q. B. D. 147.

the date of the contract, nor is it separate property which she acquired afterwards during the coverture, and, as she only contracted to be liable in respect of such property, she has not, in my opinion, in any way bound the property which is the subject of this settlement. Then it is said that this being a settlement of a woman's own property made by herself, the 19th section provides that no such settlement shall have any greater force or validity against her creditors than a like settlement made by a man would have against his creditors; but I do not think that that section affects any settlement made as this was before the date of the Act. Neither can I see on the materials before us that this settlement is void as against an execution creditor. The husband took a life estate in the property determinable on his bankruptcy, and consented that on his bankruptcy his interest should cease, and go over to the children of the marriage. I am not therefore disposed to say that there was no consideration, so that without pursuing the subject further, I do not think there is anything in the point taken on this part of the case.

WILLS, J. I am of the same opinion. It is clear that before the Act of 1882 was passed, whenever a married woman entered into a contract, she only bound the separate estate free from restraint on anticipation which she had at the time the contract was entered into. Before the Act, therefore, as it is not suggested that, assuming the settlement to be good, this property altered its character until the death of the husband, it was clearly not liable for his debt. But it is said that the Act of 1882 has enlarged the remedy of the creditors. I do not think that it is so. It is contended that s. 1, sub-s. 4, has effected this change, inasmuch as this property, which during the coverture was separate property subject to a restraint on anticipation, ceased on the death of the husband to be subject to that restraint, and became separate property acquired after the date of the contract within the meaning of the sub-section. In my judgment that is not so, because I think that the words apply to married women and not to widows, and apply only to all separate property which the married woman and not the widow may thereafter acquire. The learned counsel for the plaintiffs also says that the 5th

1887

BECKETT v. TASKER.

Wills, J.

section gives a larger right to the creditors. That section provides that every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of as her separate property all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act, and it is contended that by the operation of this section, when the periodical payment of income becomes due from this property, and comes into the hands of the wife, it is immediately liable for the payment of this debt. I do not think that so large a change was contemplated by the legislature, because, if it were so, this section would practically do away with all restraints upon anticipation, or at any rate with the larger part of their value. In my opinion, also, this section is confined to property the title to which accrued after the passing of the Act, and does not apply to this property. Then with respect to the 19th section, I entertain no doubt that the whole of the latter part relates to settlements made after the passing of this Act, and has no operation on settlements which were in existence at the time the Act was passed.

The other part of the argument also presents some difficulty, but on consideration I do not think that this settlement was voluntary. At the time it was effected there were no children of the marriage, and the birth of issue is of the essence of tenancy by the curtesy. The operation therefore of the settlement was to give the husband an immediate life estate on the death of the wife, whether there were children of the marriage or not, while he on the other hand submitted to the condition that in any case his life estate should cease on bankruptcy, a restraint which would seriously hamper the use of it by him for the purpose of raising money upon it. The mere fact that a settlement is voluntary is not enough of itself to make the settlement void under the statute of Elizabeth. It is, however, an important element in determining the question, and it is the only ground upon which the settlement has been impeached in this case. It has not been suggested that there was a de facto intention to cheat creditors worked out through the machinery of a settlement. As, therefore, I am of opinion that the settlement is not

voluntary, the groundwork of the attack upon it, in my opinion, fails, and I think, therefore, that the order appointing the receiver must be set aside.

Appeal allowed. (1)

Solicitor for appellant: *N. White.*

Solicitor for respondents: *J. C. Asprey.*

(1) Reported by Joseph Smith, Esq.

THE QUEEN *v.* CUMING AND ANOTHER.
EX PARTE HALL.

March 30.

Officer—Navy—Right to resign Commission—Conditions of Service—Desertion—Naval Discipline Act, 1866 (29 & 30 *Vict. c.* 109)—*Admiralty Regulations, art.* 160.

A commissioned officer in the Royal Navy who has accepted an appointment to serve on board one of Her Majesty's ships in commission, and who is entered on the ship's books, is not entitled without permission from the Admiralty to resign his commission and to leave his ship.

Such an officer does not by resigning his commission without the permission of the Admiralty cease to be "a person belonging to Her Majesty's navy" within s. 87 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109).

Sect. 50 of the Naval Discipline Act, 1866, which provides that every officer in command of one of Her Majesty's ships, or the senior officer present at a port, may by warrant under his hand authorize any person to arrest any offender subject to this Act for any offence against the Act mentioned in such warrant, does not prevent a naval officer, being "a person subject to the Act" within the meaning of s. 51, from arresting such offender without a warrant.

RULE calling on William H. Cuming, captain of the flag-ship *Royal Adelaide*, and the Master-at-arms, to shew cause why a writ of habeas corpus should not issue directed to them to bring up Edward Brace Turville Hall, in order that he might be discharged from their custody.

By order of Lord Coleridge, C.J., the case was argued before a Court consisting of four judges.

March 10. *A. Staveley Hill, Q.C., Judge Advocate of the Fleet*, and *A. T. Lawrence*, for the Lords Commissioners of the Admiralty, shewed cause.

Sir Henry James, Q.C. (*Charles, Q.C.*, and *R. H. Simonds*, with him), was heard in support of the rule.

Cur. adv. vult.

1887

THE QUEEN v. CUMING. EX PARTE HALL.

The facts and arguments sufficiently appear in the judgment.

March 30. The judgment of the Court (Lord Coleridge, C.J., Mathew, Cave, and A. L. Smith, JJ.), was delivered by

A. L. SMITH, J. In this case a rule nisi for a habeas corpus has been obtained on behalf of Lieutenant Edward Brace Turville Hall, calling upon the defendants to shew cause why he should not be brought up before this Court and discharged from custody; and on the 10th cause was shewn against this rule by the Judge Advocate of the Fleet, Mr. Staveley Hill, Q.C., for the defendants. The facts are as follows:—

On the 15th of July, 1870, the applicant (Lieutenant Hall) entered Her Majesty's Royal Navy as a naval cadet; and, having passed through the grade of midshipman, received his commission as sub-lieutenant on the 17th of January, 1878, and on the 30th of June, 1882, was promoted to the rank of lieutenant. Subsequently thereto Lieutenant Hall was appointed to and joined Her Majesty's ship *Orontes*. In September, 1886, Lieutenant Hall applied for an appointment in the London Salvage Corps. His application was successful: but, as the *Orontes* upon which he was serving was then on a cruise, and was not expected to return to England till April, 1887, the committee of the Salvage Corps agreed to wait until that time for him to take up the appointment. On the 29th of October, 1886, Lieutenant Hall, by letter to the Admiralty, requested to be allowed to retire or resign his appointment or his commission, and offered also to pay the passage-money for a lieutenant to Gibraltar should he be relieved there. This application was refused. Shortly after this Lieutenant Hall learned that the cruise of the *Orontes* was extended, and that she would not return to this country till the month of July, 1887; and he thereupon forwarded through his commanding officer a telegram to the Admiralty requesting leave to retire, with which request the Admiralty refused to comply. Mr. Hall then determined to resign his commission; and, on the 1st of February, 1887, the *Orontes* being then at Simon's Bay, in South Africa, he asked permission of his captain to go to Cape Town till the following afternoon. At this time a notice was standing in the saloon and officers' ward-room intimating that all leave

expired at midnight on the 2nd of February; and it was generally known that the captain of the *Orontes* intended sailing from Simon's Bay as soon after daylight on the 3rd of February as possible. The requested permission to go ashore was granted, and Lieutenant Hall thereupon left the ship: but, instead of returning the following afternoon pursuant to his leave, he from the shore wrote to his captain on the 2nd of February, as follows:—"I have the honour to inform you that, in accordance with the conditions laid down in article 160 of the Admiralty regulations, I retire from the service; and I beg to hand you my commission." This he did.

Lieutenant Hall thereupon took his passage home in the mail steamer *Grantully Castle*, which left Table Bay for Plymouth at 4 P.M. on the 2nd of February. The letter which Lieutenant Hall wrote to his captain had not been delivered when the *Orontes* left Simon's Bay on February the 3rd.

On the morning of that day, the captain of the *Orontes*, finding that Lieutenant Hall had sailed for England, telegraphed to the Admiralty; and on the arrival of the *Grantully Castle* in the Sound, Lieutenant Hall was arrested by a naval officer, and was taken in his custody to Devonport, where he was detained as a prisoner on board the *Royal Adelaide*, under the command of Captain Cuming, with a view to his being brought to trial before a court-martial under s. 19 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109) for having absented himself from his ship with an intention of not returning.

The question raised for our determination is one of great importance, viz. whether a commissioned officer in the Royal Navy who has accepted an appointment to serve on board one of Her Majesty's ships is entitled without permission from the Admiralty to resign his commission and to leave his ship.

The Judge Advocate of the Fleet, who shewed cause against the rule, contended that the officer's commission bound him to serve in the navy so long as he remained fit to perform his duty and the State required his services. On the other hand, it was contended for the applicant that the commission might be resigned at any time, like an ordinary mandate to one required to act as agent, and that the Crown had no right in time of peace to

1887

THE QUEEN v. CUMING. EX PARTE HALL.

A. L. Smith, J.

control the liberty of the subject, or insist upon the performance of duties from which the officer desired to escape.

We are unable to agree with either contention.

The cases of *Parker* v. *Lord Clive* (1) and *Vertue* v. *Lord Clive* (2) would seem to contain a complete condemnation of both propositions. Lord Mansfield, in delivering the considered judgment of the Court, said (3): "Upon the general abstract question we are all of opinion that a military officer in the service of the East India Company has not a right to resign his commission at all times and under any circumstances whatsoever whenever he pleases;" and, à fortiori, we would add, an officer holding a commission in Her Majesty's Navy.

But the learned counsel for Lieutenant Hall presented an alternative view of the matter, and insisted that, even though the commission could not be resigned under all circumstances and at the pleasure of the officer, still his obligation went no further than to bind him to serve for a reasonable time and upon reasonable terms, and thus that he was free, upon due notice, and for such causes and under such circumstances as existed in this case, to leave his ship and surrender his commission. The cases relied upon in support of this view were *Parker* v. *Lord Clive* (1) and *Vertue* v. *Lord Clive* (2), above mentioned. These were actions in which officers of the East India Company sought to recover damages for having been wrongfully arrested and brought to court-martial upon a charge of having thrown up their commissions while on active service in the Company's army. The Court was called upon to determine what was the nature of the engagement between the company and their officers, and would seem to have rightly come to the conclusion that their acceptance of their commissions imposed upon them the obligation to serve as officers in the Indian army in a reasonable manner, so as not to defeat the purpose of their employment, and to submit themselves to the ordinary military tribunal for any alleged breach of discipline. In each case the court-martial had acquitted the officer. In the actions for false imprisonment, the question whether the plaintiffs had been guilty of a breach of duty was

(1) 4 Burr. 2419. (2) 4 Burr. 2472.

(3) 4 Burr. at p. 2422.

treated as one for the jury; and, upon a finding against the plaintiffs, the judgment was entered in each case for the defendants. These authorities have no direct bearing upon this application.

It is not necessary to deal with the case of Lieutenant Hall upon any suggestion of an express or implied contract between him and the Crown. His position seems clearly defined by the terms of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109). Sect. 19 provides that "Every person subject to this Act who shall absent himself from his ship or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances when absent from his ship or place of duty do any act which shews that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly." Sect. 86 defines the word "officer" to mean "an officer belonging to one of Her Majesty's ships;" and s. 87 describes the persons liable to the Act,—"Every person in or belonging to Her Majesty's navy, and borne on the books of any one of Her Majesty's ships in commission shall be subject to this Act."

Lieutenant Hall seems to us, at the time when he left his ship without any intention to return, to come clearly within these sections. He was an officer of the *Orontes*, whose name was borne on the ship's books while the ship was in commission. But it was said that when he left for England he was not a person in or belonging to Her Majesty's navy within s. 87, because he had sent his commission to his captain: and it was urged that every section of the Act which in terms applies to "persons subject to the Act," must be read as applying only to those who had not so resigned their commissions. If this were so, every officer of one of the Queen's ships might with impunity abandon the ship whenever he pleased. It is obvious that such a construction would be fatal to the spirit and object of the Act.

It was further contended that the persons "liable to the Act" did not include those officers who after reasonable notice and under reasonable circumstances had resigned their commissions; and that the Act, as regards such persons, was inoperative. But

1887

THE QUEEN v. CUMING. EX PARTE HALL.

A. L. Smith, J.

this mode of interpreting the statute would lead to this consequence, that it would be always matter of doubt whether an officer who had gone through the form of resigning his commission was still in the navy or not. If his reasons were sufficient and he was entitled to leave the service, he would not be in the navy: if he were not in a position to resign his commission, he would still be an officer. His superior officer would have no means of judging as to the sufficiency of the grounds upon which he claimed to resign. If the officer were right, he would be entitled to resist his detention by force, or to bring an action subsequently for false imprisonment. And so, if he were brought to a court-martial, and imprisoned, he might in an action against the officers of the Court question their jurisdiction and submit to the jury that when placed under arrest he had ceased to be an officer in the navy.

The difficulty and confusion that this mode of interpretation would give rise to may be illustrated by reference to the sections of the Act with respect to neglect of duty, mutiny, and insubordination. An officer on board one of Her Majesty's ships in commission might be guilty of the misconduct at which those sections are aimed, and be free from punishment, if he could afterwards satisfy a jury that at the time when he was alleged to have done wrong he had taken all reasonable steps for resigning his commission.

Reference was made to article 160 of the Admiralty regulations of 1879 under which Lieutenant Hall had acted. The regulation is in the following terms:—"If any officer shall retire from his employment without the sanction of the Admiralty, except on good and sufficient reasons to be judged of by the Admiralty, or shall refuse or avoid service if found capable of serving, he shall not be allowed to receive half-pay; and his name shall be removed from the list of officers of the Royal Navy."

The learned counsel for Lieutenant Hall did not rely upon this regulation as a justification of or authority for the resignation of Lieutenant Hall, but pointed to it in support of his contention as to the meaning of the statute. We are clearly of opinion that the regulation must be construed with the statute, and that it was

not intended to control its operation. The regulation points out what may follow upon an officer resigning his commission without such sufficient cause as shall satisfy the Admiralty, or where he refuses employment offered him by the Admiralty, and his doing so is not otherwise punishable.

It is not necessary for us to decide the very grave question whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. Some of us, as at present advised, are of opinion with Yates, J., in the case cited (1), that it would not. We leave the question, however, distinctly open to be argued and decided if in any case hereafter it should be necessary to decide it. But we are clearly of opinion that, where a commissioned officer accepts an appointment to serve in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Navy Discipline Act, and at his own will and pleasure cannot resign his appointment, and may be tried by court-martial for any of the offences specified in the Act.

We were urged to depart from the plain meaning of the statute because of the consequences which it was said would otherwise result. It was argued that, if the Act applied to every one in the Royal Navy whose name was borne on the books of one of Her Majesty's ships in commission, the result would be that the Lords of the Admiralty might impose upon an officer perpetual servitude by directing his name for life to remain on the ship's books. But this difficulty seems to us remote and far-fetched. The legislature cannot have contemplated a proceeding so unreasonable and entirely unlikely to be adopted. We are not disposed, in order to escape from a peril so remote and improbable, to adopt an interpretation which would entail the consequences above pointed out, i.e. of Her Majesty's ships in commission being left unofficered and uncommanded, at the sole will and pleasure of the officers.

A further point was made by Sir Henry James for Lieutenant Hall, that the arrest of Lieutenant Hall on board the *Grantully Castle* was illegal. According to Lieutenant Hall's affidavit,

(1) *Vertue* v. *Lord Clive*, 4 Burr. at p. 2477.

1887

THE QUEEN v. CUMING. EX PARTE HALL.

A. L. Smith, J.

which is not contradicted, he was arrested by a naval officer who exhibited no warrant, and who it must be taken had none. By s. 50 of the Naval Discipline Act, 1866, "Every officer in command of a fleet or squadron of Her Majesty's ships, or one of Her Majesty's ships, or the senior officer present at a port, may by warrant under his hand authorize any person to arrest any offender subject to this Act, for any offence against the Act mentioned in such warrant; . . . and any person named in such warrant may forthwith on his apprehension, if the warrant so directs, be taken on board the ship to which he belongs or some other of Her Majesty's ships."

The contention on the part of Lieutenant Hall is, that he could only be arrested under such a warrant, and that there was no such warrant in this case. It is to be observed, however, that, under such a warrant, not merely a person in Her Majesty's Navy, but any person, may make the arrest; and, further, that, although the section authorizes the person named in the warrant to be taken on board one of Her Majesty's ships, it does not authorize his detention on board. Such an authority, if it stood alone, would be a very imperfect instrument for the bringing to punishment of offenders against the Act. There is, however, another section of the Act, the 51st, of a far more effectual character. By that section, every person subject to that Act who shall not use his utmost endeavours to detect, apprehend, and bring to punishment all offenders against that Act, and shall not assist the officers appointed for that purpose, shall suffer imprisonment or such other punishment as is thereinafter mentioned. The words are not "every person to whom a warrant is directed," but "every person subject to the Act:" and we think that the necessary inference is that such a person has power to apprehend and bring to punishment any offender against the Act; for, it would be manifestly unjust to punish a man with imprisonment for not doing that which he had no power to do. Moreover, it seems to us, looking at the number and nature of the offences dealt with in the first forty-five sections of the Act, that it would be quite impossible to maintain discipline on board amongst a ship's crew, if no offender could be arrested until a warrant had been obtained from the officer in command of the ship. In this case, the arrest

1887

THE QUEEN v. CUMING. EX PARTE HALL.

A. L. Smith, J.

was effected by a naval officer. It is not stated that he was not a person subject to the Naval Discipline Act; and we think we ought not upon the facts stated to us to infer that he was not so subject: and we infer that he was. Even if we considered the arrest to have been irregular, it is by no means clear that it would have been our duty under the circumstances to decree the discharge of the applicant before he had been brought to trial by the proper tribunal, viz. a court-martial: see *Reg.* v. *Mount* (1).

In holding, as we do, that Lieutenant Hall is subject to the jurisdiction of a court-martial, we think it right to add that he has acted, as it seems to us, in good faith and in the honest belief that the terms of the regulation referred to entitled him without permission from the Admiralty to retire from the service.

In dealing with this case, should it be brought to trial, we have no doubt that it will be borne in mind that the regulation in question has unfortunately been so framed as to leave considerable doubt as to its meaning. It seems to us that even a lawyer of some learning and experience might be excused if he failed to interpret it correctly: and, this being so, we are of opinion that, though the rule should be discharged, it should be discharged without costs. We accordingly discharge it without costs.

Rule discharged.

Solicitors for applicant: *Crowder & Vizard.*
Solicitor for defendants: *The Solicitor to the Admiralty.*

(1) Law Rep. 6 P. C. 283.

J. S.

1887
April 25, 26; *May* 7.

WARD *v.* THE MAYOR AND TOWN COUNCIL OF SHEFFIELD.

Municipal Corporation — Application of Borough Fund — Poll — Register of Owners and Proxies, whether necessary — The Municipal Corporations (Borough Funds) Act, 1872 (35 & 36 *Vict. c.* 91), *s.* 4—*The Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *sched. II. r.* 19.

By CAVE, J. The town council of a borough is not bound, under the Public Health Act, 1875, sched. II., r. 19, to keep a register of owners and proxies for the purpose of taking a poll in the borough with respect to the application under 35 & 36 Vict. c. 91, of the borough funds in opposing local and personal bill in parliament.

ACTION tried by Cave, J., without a jury.

The facts are stated in the judgment.

Sir R. Webster, A.G., R. S. Wright, and *J. E. Barker,* for the plaintiff.

A. Charles, Q.C., Moorsom, Q.C., and *Gerald Fitzgerald,* for the defendants.

Cur. adv. vult.

May 7. The following judgment was delivered by

CAVE, J. In this case the plaintiff, who is a ratepayer of Sheffield, brings an action against the Corporation of Sheffield under the following circumstances:—

On or about November 20, 1886, defendants gave public notice of their intention to promote a bill empowering them to purchase the undertaking of the Sheffield Waterworks Company. On December 28, 1886, at a public meeting of owners and ratepayers, held in pursuance of s. 4 of 35 & 36 Vict. c. 91, a resolution consenting to the promotion of the bill was carried. A poll was thereupon demanded, and the chairman then read a notice that the poll would be taken by means of voting papers, which would be issued to all such ratepayers and owners (if any) as might be entitled to vote; that such voting papers would be delivered to the respective persons entitled to them at their respective addresses on January 13, 1887; but that any persons qualified to vote who should not duly receive such voting paper on that day might apply personally to the chairman for a

voting paper on any day before January 16, 1887; and that the voting papers would be collected on Monday, January 17. This notice was afterwards published at the places where public notices are usually affixed in Sheffield between December 31 and January 4. The plaintiff issued his writ on January 5, and now claims a declaration that the notice and all proceedings taken thereunder were void, and an injunction restraining the defendants from applying the public funds or rates under their control in paying the expenses of the notice or of the proceedings thereunder, or in paying the costs and expenses of promoting the bill until the consent of the ratepayers and owners has been duly obtained.

On Monday, January 17, a motion was made on behalf of the plaintiff for an interim injunction to restrain the defendants from proceeding with the poll; but as that was the day fixed for collecting the voting papers it was arranged that the motion should not then be proceeded with, but that the hearing of the action should be expedited; and it accordingly came on and was heard before me on April 25, 26.

The first contention on behalf of the plaintiff was that no poll at all could be taken unless the corporation had duly made and kept the register of owners and occupiers provided for by the Public Health Act, 1875.

In *Reg.* v. *Sheffield* (1) it was held that a corporation could not apply the borough fund (there being no surplus) in paying the expenses incurred in opposing a bill promoted by a waterworks company for obtaining fresh powers, although such opposition might have been for the public benefit of the inhabitants of the borough. In consequence of this decision the statute, 35 & 36 Vict. c. 91, was passed in the following year. By that Act, after reciting that it was expedient to extend the powers of governing bodies so as to enable them to apply the borough or other funds under the control of such governing body towards such costs, charges, and expenses as might be incurred for the purposes and in the manner therein provided, power is given to (among other governing bodies) the council of any municipal borough, when in their judgment it is expedient to promote or oppose any local and

(1) Law Rep. 6 Q. B. 652.

1887

WARD v. MAYOR, &c., OF SHEFFIELD.

Cave, J.

personal bill in Parliament, to apply the borough fund, borough rate, or other the public funds or rates, to the payment of the costs and expenses attending the same. The 4th section of the Act imposes certain restrictions on the exercise of this power, and it is provided, inter alia, that no expense in promoting any bill shall be so charged unless such promotion shall have had the consent of the owners and ratepayers of the district, to be expressed by resolution in the manner provided in the Local Government Act, 1858, for the adoption of that Act. By the Public Health Act, 1875, the Local Government Act, 1858, was repealed; and by s. 313 of the later Act it was provided that where in any Act any provisions of any Act repealed by that Act were mentioned or referred to, such Act should be read as if the provisions of that Act applicable to the same or similar purposes were therein mentioned or referred to instead of such repealed provisions, and were substituted for the same. Schedule 3 of the Act of 1875 contains rules as to resolutions of owners and ratepayers. By rule 6, when a meeting of owners and ratepayers is held, the chairman is to propose the resolution to the meeting, which is to decide for or against its adoption. If a poll is demanded, it is to be taken by voting papers in the same way and with the same incidents and conditions as to the qualification of electors and scale of voting, as to notice to be given by the returning officer, delivery, filling up, and collection of voting papers, &c., and in all respects whatsoever as is provided by the rules for the election of local boards in schedule 2 to the Act, except that in districts or places where there is no register of owners and proxies under the Act, any owner or proxy is to be entitled to have a voting paper delivered to him if at least fourteen days before the last day appointed for delivery of the voting papers he sends a claim in writing to the summoning officer, containing the particulars required by schedule 2 to be contained in claims to be entered on the register of owners and proxies, and except that the provisions with respect to certain specified days of the month are not to apply. The second schedule, which is headed "Rules for election of local boards," provides by rule 19 that the local board shall cause a register to be made and kept, in which shall be entered

the names, addresses, and qualifications of the owners claiming and entitled to vote, and the names or descriptions, addresses, and qualifications of the appointors of proxies, and the names and addresses of proxies duly appointed. By rule 22, a person entitled to vote either as owner or ratepayer may object to the keeping of any name on the register by writing in the form L in schedule 4. By rule 23, claims and objections are to be sent to the chairman of the local board on some one of the first six days of March, and a claim or objection sent in at any other time is not to be admitted by the chairman. By rule 25, the chairman is, between February 20 and March 1, to publish a notice in the form L in schedule 4, and signed by him, of the time within which claims and objections are to be made, and is to cause a copy of such notice to be inserted in some local newspaper circulating in the district, and to be affixed at the places where parochial notices are usually affixed. By rule 28, not later than March 16 the chairman is to close the revision and sign the revised register, and that register is to continue in force for the twelve months next ensuing. By s. 5 of the Act, England is divided into urban sanitary districts and rural sanitary districts, under urban and rural authorities respectively. By s. 6, urban authorities are in boroughs, the mayor, aldermen and burgesses acting by the council; in Improvement Act districts, the improvement commissioners; in local government districts, the local board. By s. 8 the members of local boards are to be elective, and all matters relating to the election of local boards are to be governed by the rules contained in schedule 2. There are therefore three kinds of bodies exercising the powers of urban sanitary authorities; town councils, improvement commissioners, and local boards. The last-named are by the joint operation of s. 8 and schedule 2 compelled to make and keep a register. So also are improvement commissioners in some cases by virtue of s. 312. But I can find no section in the Act which compels a town council to make and keep such a register at the times and in the manner required by the rules I have read from the 2nd schedule. Then, town councils not being required by the Act to keep such a register, there is consequently no such register in boroughs. Next comes schedule 3, rule 6, which says

1887

WARD v. MAYOR, &c., OF SHEFFIELD.

Cave, J.

that in districts or places where there is no register of owners and proxies under that Act, any owner or proxy shall be entitled to have a voting paper delivered to him, if at least fourteen days before the last day appointed for delivery of the voting papers he sends a claim in writing to the summoning officer containing the particulars required by schedule 2 of that Act to be contained in claims to be entered on the register of owners and proxies, and except that the provisions with respect to certain specified days of the month shall not apply. It is said that this exception is intended only to provide for cases where the question to be determined arises before the first election of a local board, or between the first election and the following March 16, when the first register will be made, but it seems more natural to construe the expression as applying to places where a register of owners and ratepayers is not required to be kept. It is, however, contended that the town council is required to keep such a register, if not expressly yet at any rate impliedly. Town councils are certainly not required to keep such a register merely from the fact that a poll may have to be taken in manner provided by schedule 3, for by s. 272 of the Act such a poll may require to be taken in a place situated in a rural sanitary district and having a known and defined boundary, and it would be monstrous to contend that every such place must keep a register of owners and ratepayers. It is, however, contended that a town council has to discharge the same functions as a local board and so comes within that expression, but, however that may be where the context points to that conclusion, I am clearly of opinion that in s. 8 and in schedule 2, except as far as it is incorporated in schedule 3, the expression local board means a local board in the strict sense of the term, and does not include town councils in boroughs. Not only the words of the statute but reason also points to the same conclusion. A poll of owners and ratepayers may be taken under ss. 166, 216 and 272 of the Act, but in none of these can such a poll be taken in a borough, so that the occasions for the use of a register would be very rare in a borough. Owners therefore would hardly think it worth while to take the trouble to send in their claims, and when at last the occasion did arise it would probably be found that there were no

or very few owners on the register. The Attorney-General contended that previous Acts threw a light on the Act of 1875, and supported his view of its construction. I do not care to follow that argument. If the words of the former Acts are the same I should put the same interpretation on them. If they are different they throw no light on the construction of the present Act.

The next contention was that the notice was bad because it did not give owners a reasonable time within which to make their claims, and so entitle themselves to vote. By sched. 2, rule 14, owners may give their votes personally or by proxy. By rule 16 no member of a corporation or body of persons (other than a partnership firm of not more than six persons) is entitled to vote individually as owner in respect of property belonging to such corporation or body. The rateable value of the property in the borough is about a million, and the rateable value of property belonging to corporations is about £200,000, so that the owners of four-fifths of the property in the borough may, and the owners of one-fifth must, vote by proxy. By sched. 3, rule 6, in order to be entitled to a vote an owner or proxy must send in his claim at least fourteen days before the last day appointed for delivery of voting papers. Mr. Charles contended that in this case this last day was January 15, the last day on which a voting paper could be obtained; but if the 2nd and 3rd schedules are read carefully, I think it will be clear that the last day was January 13, the day on which the voting papers were to be delivered to the voters at their addresses. The owner who is entitled is to have a voting paper delivered to him; the fourteen days are required to give the chairman an opportunity of deciding whether the claimant is entitled, and, if he is so entitled, of directing a voting paper to be delivered to him at his address; and it is only reasonable, therefore, that the time for making the claim should be calculated from the date for delivering the voting papers at the voters' addresses. If I am right as to this, then December 29 was the last day for sending in the claim. If Mr. Charles is right, December 31 was the last day. But no notices were published until January 1, and they were not completely posted till the 3rd, so that in any point of view the owners and proxies had not a reasonable time for sending in their claims and entitling

1887

WARD v. MAYOR, &c., OF SHEFFIELD.

Cave, J.

themselves to vote. That this was the case in fact is shewn by the result, for it is admitted that only five owners sent in claims in sufficient time to entitle themselves to vote. If I were to hold that this was reasonable, I should enable a town council, when so disposed, virtually to disfranchise the owners.

Mr. Charles says that the owners must look after their own rights, and cannot expect any assistance from the town council. But at any rate they are entitled to such notice as will give them a reasonable opportunity with due diligence to make their claim, and that in my opinion they have not had in this case. Moreover the notice, so far from assisting the owners, appears to me to be calculated to mislead them. It states that voting papers will be issued to all such ratepayers and owners (if any) as may be entitled to them, and will be delivered to them at their addresses; but it omits to point out that whereas the ratepayers are already entitled to them, the owners are only entitled to them upon sending in a claim, the time for sending in which had actually elapsed before any of the notices were posted on the church doors.

At the close of his speech, in opening the case for the defence, Mr. Charles for the first time suggested that the plaintiff ought to have sued in the name of the Attorney-General, and on this ground he asked me to dismiss the action. This point was not raised on the application for an interim injunction which was made on January 17, nor was it raised on the pleadings. If it had been made on either of those occasions it might have been met by an amendment, as was done in *Caldwell* v. *Pagham Harbour Reclamation Co.* (1) I am not disposed to give way to a technical objection not taken till the last moment.

Mr. Charles also objected that the plaintiff's proper remedy was to wait until the council made any order for the payment of any of those expenses, and then to bring it up on certiorari and move to quash it. All technical objections are disagreeable to my mind; but this is, I think, the most hateful of all. The parties come prepared to argue the case on the merits. Neither on the partial hearing which took place on January 17, nor in the statement of defence, is it suggested that the plaintiff has

(1) 2 Ch. D. 221.

taken a technically wrong course; yet at the last moment the defendants' counsel invites the Court to say to the plaintiff: "You are entitled to approach the Temple of Justice. You have a case of much importance for the decision of the Court, and the arguments on either side have been duly heard. But you have approached the temple by the front entrance, when you ought to have come in by the back way. Retire; and renew your labour and redouble your expenses." For my part I will never adopt that course, which, in any case inexpedient in the ends of justice, in this case is more than usually obnoxious. The plaintiff came at once when but a small expense had been incurred, and when there was ample time for the town council to have retraced their steps, and he asks for the judgment of the Court on the proceedings as a whole. It is said that he should have waited until the whole of the expenses had been incurred, and then should have brought up the orders of the town council one by one as they directed this or that portion of the expenses to be paid, and should have brought them singly and successively before the Court. I do not believe that in the darkest hour of technicality before the name of Jeremy Bentham had been heard of, the Courts would have adopted this course, and I have no hesitation in overruling the objection.

In my judgment the plaintiff is entitled to the relief he asks for, and I make the declaration and grant the injunction claimed with costs.

Judgment accordingly.

Solicitor for plaintiff: *H. A. Maude, for Broomhead, Wightman & Moore.*

Solicitors for defendants: *Richard Smith & Wilmer.*

W. A.

1887
May 17.

[IN THE COURT OF APPEAL.]

SCHULZE & CO. *v.* THE GREAT EASTERN RAILWAY COMPANY.

Carrier—Measure of Damages—Delay in delivery of Samples—Loss of Season.

A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time:—

Held (affirming the judgment of Day, J.), that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered.

THIS was an appeal by the defendants from the judgment of Day, J., at the trial without a jury.

The plaintiffs were woollen merchants, and for the purpose of their business they were in the habit yearly of causing pattern goods to be made. These patterns were made on small looms. Each pattern was then divided into eight or ten pieces so as to make that number of sets of samples. The cost of making was about 630*l.*, exclusive of the cost of arranging, dividing into sets, and other work on the samples. One of the sets of samples was sent with a traveller to Italy, but as it was required for a journey which one of the firm intended to make to Paris, the traveller was directed to return it to Galashiels, in Scotland. He accordingly delivered it to the agent of the defendants at Milan, who was informed that the parcel contained samples, and it was forwarded to Basle. Thence it was sent by the defendants, on the 14th of July, and a post card was dispatched to the plaintiffs stating that the goods, described as cotton samples (a mistake for woollen), were due on the 21st of July. The parcel was not tendered to the plaintiffs till the 9th of September following, and was refused by them. The evidence for the plaintiffs was that at the time the samples should have been delivered no other set was available for the journey to Paris, and that it was worth to them 60*l.*; that they would have given that sum for such a set, but

that it could not be procured in the market or manufactured in less time than a month, or by any other means than by re-making the whole of the patterns. It was also stated that when the parcel was delivered the season for travelling with such goods was over, and the samples were valueless.

On these facts the learned judge held that a carrier who accepts samples for carriage must be taken to know that their value would be diminished by failure to deliver in a reasonable time, and that the diminution of value in this case was 60*l.* He accordingly gave judgment for the plaintiffs for that amount.

The defendants appealed.

Crump, Q.C., and *Douglas Walker*, for the defendants. The measure of damages adopted by the learned judge was wrong. The only measure of damages is the difference between the market value of the goods at the time when they should have been delivered and at the time when they were delivered. Here there has been no loss of market and no injury to the goods, but only a loss by reason of not being able to use the samples in the way of trade. To give damages for this is in effect to take into consideration the profits that might have been made in Paris. *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (1) is a different case, because there the delay was in the delivery of the same goods which were to be made up. Further, there was no notice to the defendants of the object for which the goods were sent. *Great Western Ry. Co.* v. *Redmayne.* (2)

Moulton, Q.C., and *Woodthorpe*, for the plaintiffs, were not called on.

LORD ESHER, M.R. I think this case is within *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (1). These goods were delivered to the carriers under a denomination which the learned judge has found would inform them that there was a commercial necessity that the goods should be delivered in a reasonable time. They were not so delivered, and the question is what is to be the measure of damages. In *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (1) the question arose as to the recovery of damages for a

(1) 9 C. B. (N.S.) 632. (2) Law Rep. 1 C. P. 329.

1887

SCHULZE v. GREAT EASTERN RAILWAY CO.

delay by which the plaintiff lost the season. The learned judge who tried the case had told the jury that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time, and it was laid down by the Court of Common Pleas that if the meaning of loss of season was that "the goods by reason of their not having been delivered in due time had been lessened in value, that is, if in consequence of the delay they had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers for them had gone by, and so the goods were left in the plaintiff's hands deteriorated or diminished in value," then there was not any mistake in point of law in the direction of the learned judge. If it is right here to say that the railway company were bound to know that late delivery of the samples might have the effect of their being left on the consignee's hands at a time when their value to him would be lessened, then these remarks apply to this case. The cases in which the Court are bound to consider the market value of the goods are those in which the plaintiff can go into the market and supply himself. If he cannot do so that measure of damages cannot be applied. Here the plaintiffs could not have supplied themselves with the like goods in the market, and the test of damage to be applied is that laid down in *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (1) within the principle of which this case falls.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitor for plaintiffs: *Trinders.*
Solicitor for defendants: *W. F. Fearn.*

(1) 9 C. B. (N.S.) 632.

A. M.

[IN THE COURT OF APPEAL.]

1887
April 29.

EX PARTE BISCHOFFSHEIM. IN RE AYLMER.

Bankruptcy—Scheme of Arrangement—Approval of Court—Reasonableness—Benefit of Creditors—Attempt to give Trustee under Scheme Powers of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 27.

A scheme of arrangement of the affairs of a debtor provided that his property which would become divisible among his creditors, if he were adjudged a bankrupt, should vest in a trustee to be appointed by the creditors, and that the trustee should administer the property under the supervision of a committee of inspection in the like manner, and with the like powers and duties, and subject to the like conditions in all respects, as though the debtor had been adjudged bankrupt, and the trustee had been appointed trustee in the bankruptcy; and that the provisions of s. 27 of the Bankruptcy Act, 1883, relating to the discovery of the property of a bankrupt, should, so far as the same were applicable, apply to the proceedings under the scheme:—

Held, that, inasmuch as s. 27 does not apply to a scheme of arrangement under s. 18, and cannot by agreement between a debtor and his creditors be incorporated in such a scheme, the scheme gave the creditors no greater advantage than they would have had in a bankruptcy, while it deprived them of some of the powers which they would have had, and of the control of the Court in the administration of the estate. That, consequently, the scheme was neither reasonable nor calculated to benefit the general body of creditors, and ought not to be approved by the Court.

APPEAL against an order of the registrar approving of a scheme of arrangement of the affairs of J. E. F. Aylmer, which had been accepted by his creditors under s. 18 of the Bankruptcy Act, 1883, and rescinding a receiving order against him.

The scheme contained the following provisions:—

"That the property of the debtor which would become divisible amongst his creditors, if he were adjudged bankrupt under these proceedings, shall vest in a trustee to be appointed by the creditors under this scheme of arrangement, and that such trustee shall administer the aforesaid property under the supervision of a committee of inspection in the like manner, and with the like powers and duties, and subject to the like conditions in all respects as though the debtor had been adjudged bankrupt, and such trustee aforesaid had been appointed trustee in the bankruptcy.

"That from the date of the approval by the Court of this

1887

EX PARTE BISCHOFF-SHEIM. IN RE AYLMER.

scheme of arrangement the same shall be accepted by the creditors in full satisfaction and discharge of all debts due to them from the debtor from which an absolute discharge in bankruptcy would release him; but that, notwithstanding such approval and acceptance, the debtor shall give to the trustee for the time being under this scheme such assistance in the realisation and distribution of the said property as the trustee might have required of him had he been adjudged bankrupt and obtained his discharge.

"That the provisions of s. 27 of the Bankruptcy Act, 1883, relating to the discovery of the property of a bankrupt, shall, so far as the same are applicable, apply to the proceedings under this scheme of arrangement.

"That the trustee shall receive such remuneration for his services as the committee of inspection may determine."

That five persons named "shall be appointed the committee of inspection under this scheme of arrangement.

"That the provisions of s. 22 of the Bankruptcy Act, 1883, shall, so far as the same are applicable, apply to the committee of inspection under this scheme."

The official receiver reported "that the debtor's proposal for a scheme of arrangement is reasonable, having regard to the difficulty and delay which it is probable will attend the realisation of the property, and to the provisions contained in the proposal relating to s. 27 of the Act, and to the assistance which the debtor shall render to the trustee in carrying out the same. In view, however, of the nature of the assets, and the fact that the scheme does not vest in or confer upon the trustee any property or power beyond that which would vest in or be exercisable by a trustee in bankruptcy, the official receiver is unable to report that the scheme is calculated to benefit the creditors to any greater extent than administration in bankruptcy."

Notwithstanding the opposition of Mr. H. L. Bischoffsheim, a dissenting creditor, the registrar made an order approving the scheme.

Bischoffsheim appealed.

Cooper Willis, Q.C., and *Woodfall*, for the appellant. This is not such a scheme as is contemplated by the Act, and it ought

1887

Ex parte Bischoffsheim. In re Aylmer.

not to be approved. The trustee under a scheme of arrangement has not the same powers as the trustee in a bankruptcy: *Ex parte Whinney* (1); and the creditors cannot by their resolution give him the same powers. In particular the power which, by s. 27 of the Act (2), is given to the trustee in a bankruptcy to summon before the Court for examination the debtor or his wife, or third persons, does not apply to the trustee under a scheme of arrangement, and the creditors cannot by agreement confer such a power upon him. Sect. 18 expressly makes Parts III. and V. of the Act apply to a composition or a scheme of arrangement, and s. 27 is in neither of those parts, being in Part I. Nor can the creditors delegate to the committee of inspection the power to fix the trustee's remuneration. The power to do that, which is given by s. 72, applies only to a committee of inspection in a bankruptcy appointed under s. 22, which occurs in Part I. The scheme is a device to escape the control of the Board of Trade. Any scheme which is contrary to the intention of the Act is unreasonable, and ought not to be approved: *Ex parte Clark.* (3) The credi-

(1) 17 Q. B. D. 238.

(2) Sect. 18 provides that, when a receiving order has been made against a debtor, his creditors may accept a composition or a scheme of arrangement proposed by him, but the composition or scheme is not to be binding on the creditors unless it is approved by the Court.

By sub-s. 6: "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall . . . . refuse to approve the composition or scheme."

Sub-s. 10: "The provisions of a composition or a scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court."

Sub-s. 12: "If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme."

Sub-s. 13: "Part III. of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee,' 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' as in the last preceding sub-section."

(3) 13 Q. B. D. 426.

1887

Ex parte Bischoffsheim. In re Aylmer.

tors derive no advantage from this scheme which they would not possess under a bankruptcy, and they are deprived of the control of the Court.

Hansell, for the debtor. The registrar has exercised a judicial discretion having all the facts before him, and this Court will only interfere upon the strongest grounds. The scheme is not shewn to be so unreasonable or so little calculated to benefit the creditors as to induce the Court to refuse its approval. There is nothing in the scheme which is forbidden by the Act. It is enough if it appears to be as beneficial to the creditors as a bankruptcy. It will at any rate reduce the cost of administration. So far as the debtor himself is concerned, there can be no objection to the introduction of the provisions of s. 27, for he has agreed to it, and sub-s. 10 of s. 18, gives the Court power to enforce the provisions of a composition or scheme. *Ex parte Whinney* (1) only decides that the trustee under a scheme of arrangement does not, as a matter of right, possess the same powers of discovery as the trustee in a bankruptcy; it does not decide that those powers cannot be conferred on him by agreement. There is nothing unreasonable in conferring on the trustee the powers of s. 27, so far as they can be conferred by agreement.

[Lopes, L.J., referred to s. 96 of the Bankruptcy Act, 1869, and to *Ex parte Willey*. (2)]

As to the trustee's remuneration, s. 72, which is in part III. of the Act, applies, and the creditors have exercised their option under that section of delegating to the committee of inspection the duty of fixing the remuneration of the trustee.

Lord Esher, M.R. It seems to me that in this case the circumstances disclosed by the scheme itself shew that, in order to enable justice to be done to every one, the creditors require all the powers which are given by the Bankruptcy Act in the case of a bankruptcy. If the scheme was honestly intended (and I assume that it was) it was intended to give the creditors all those powers. They wished to have those powers, and they attempted to obtain them by agreement; but they get nothing more under the scheme than they would have had if the matter had

(1) 17 Q. B. D. 238. (2) 23 Ch. D. 118.

proceeded in bankruptcy. For that reason alone the scheme is a bad one, and ought not to be approved by the Court. But in fact the creditors have not got under the scheme all the powers which the Act gives in a bankruptcy. Sect. 27 cannot be incorporated into a scheme of arrangement by the agreement of the parties. The powers conferred by s. 27, cannot be exercised by the Court under a scheme of arrangement; for, as was decided by this Court in *Ex parte Whinney* (1), the trustee under a scheme of arrangement is not a trustee at whose instance the powers given by s. 27 can be exercised. The scheme, therefore, gives the creditors less than a bankruptcy would, and in my opinion such a scheme was not intended by the Act to be adopted. Consequently, the terms of the scheme are not "reasonable," and they are "not calculated to benefit the general body of creditors," and therefore the scheme ought not to be approved.

FRY, L.J. I am of the same opinion. We have to inquire whether the scheme is or is not reasonable, and whether it is or is not "calculated to benefit the general body of creditors." In my opinion it must possess both those qualities; if it is deficient in either of them it fails. The scheme itself shews that the conditors considered that the large powers of discovery given by s. 27 are necessary in the circumstances of this case, and therefore they desired to incorporate them. I agree with the Master of the Rolls that it is not possible for the Court, at the instance of the trustee under a scheme of arrangement, to make an order under s. 27 for the attendance of third persons for examination—an order which would be enforcible by process of contempt—even though the creditors have agreed that s. 27 shall be incorporated. I think the effect of the scheme is simply to get rid of the control of the Court over the proceedings—to push the Court a little further away in the administration of the debtor's estate. It gives the creditors less than they would have had in a bankruptcy, though they desired to have the same powers as in a bankruptcy. I think that such a scheme is neither "reasonable" nor "calculated to benefit the general body of creditors," and therefore it ought not to be approved.

(1) 17 Q. B. D. 238.

1887

EX PARTE BISCHOFFSHEIM. IN RE AYLMER.

LOPES, L.J. Sect. 18 in effect provides that every scheme of arrangement must be "reasonable," and "calculated to benefit the general body of creditors." It appears to me that by this scheme the creditors are seeking to obtain the advantages of a bankruptcy without giving the Court the powers and the control over the proceedings which it would have in a bankruptcy. I think that this was not contemplated by the Act, and, in my opinion, no scheme can be reasonable which was not contemplated by the Act, and which is contrary to its policy. The Act did not contemplate that the powers of discovery given by s. 27 should exist under a scheme. Nor is the scheme for the benefit of the creditors, for they clearly get by it nothing more than they would get in a bankruptcy, and they probably get less. Therefore, I think the scheme is bad.

Hansell asked for leave to summon a fresh first meeting of the creditors.

THE COURT refused the application.

Solicitors for appellant: *Freshfields & Williams.*
Solicitor for debtor: *H. F. Barnett.*

W. L. C.

[IN THE COURT OF APPEAL.]

1887
May 2.

IN RE BETTS & BLOCK. EX PARTE THE BOARD OF TRADE AND ANOTHER.

Bankruptcy—Realization of Debtor's Property—Duties of Debtor—Insurance on Bankrupt's Life—Submission to Medical Examination—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24, 28.

The principal asset of a bankrupt was a contingent reversionary interest which was only saleable if the bankrupt's life was insured. The trustee requested the bankrupt to submit to a medical examination with a view to a policy being effected. This the bankrupt refused, although he had not long before submitted to such an examination with a view to raising money on his interest, and although in his public examination he said that since then he had contracted no disease, and that he knew of no reason why he should not submit to examination. The registrar having declined to treat this refusal as misconduct which he could take into consideration in determining whether the discharge of the bankrupt should be suspended or refused under s. 28 of the Bankruptcy Act, 1883, on appeal :—

Held (by Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), that taking the necessary steps to effect such an insurance was not an act in relation to his property or the distribution of the proceeds which the bankrupt could be required to do under s. 24 of the Bankruptcy Act, 1883, and that the refusal to do so was therefore not misconduct on his part.

By Fry, L.J., that the acts which the bankrupt was required to do were in relation to his property and its distribution, and that the facts shewed that the request was reasonable.

In re Garnett, Ex parte Bullock (16 Q. B. D. 698), approved.

MOTION by way of appeal to reverse, rescind, or vary an order by the registrar that the discharge of the bankrupt Henry John Block should be suspended for the period of six months only from the date of such order, and that in lieu thereof an order might be made either refusing the order of discharge or granting the same subject to such conditions concerning the future earnings or income of the bankrupt or his after-acquired property as to the Court might seem fit.

Among the assets of the bankrupt Block there was a contingent reversionary interest under the will of his father in the sum of 2000*l.*, should he survive his mother. The bankrupt's age was stated to be about twenty-five, and that of his mother sixty-nine. This contingent reversion was returned as an asset the

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

value of which the bankrupt could not estimate. It appeared that prior to the bankruptcy an attempt had been made to raise money on this reversionary interest, and for that purpose Block had sent in a proposal to an insurance office, and had submitted to a medical examination. The insurance company accepted the proposal, but the insurance was not carried out. After the bankruptcy the trustee had an offer of 800*l.* for the reversionary interest on condition that the bankrupt Block's life was insured, and he applied to the bankrupt to sign the necessary requisition and submit to a medical examination. The bankrupt declined, and at the public examination he was questioned as to why he did so. He said that he had had no disease that would render it more difficult to insure his life since the date of the application already mentioned, and that he did not think there was any reason why he should not do as he had done at the date of that application, but he still declined to take the steps necessary for effecting an insurance on his life.

The bankrupt having applied for his discharge the registrar suspended it for six months on grounds unconnected with the facts above stated, but he declined, on the authority of *In re Garnett, Ex parte Bullock* (1), to treat the refusal of the bankrupt to submit to medical examination as misconduct, and did not deal with that point in considering the time for which the discharge should be suspended.

The Board of Trade, being dissatisfied with the decision of the registrar, concurred with the trustee in appealing.

April 23. *Sir E. Clarke, S.G.*, and *Linklater*, in support of the appeal. The statement of accounts shews that the bankrupt by declining to be examined deprives the creditors of the greater part of the assets. The reversionary interest can be sold for 800*l.* if there is a policy to cover the contingency, but it is worth nothing without it. The registrar proceeded on the authority of *In re Garnett, Ex parte Bullock* (1), where Cave, J., refused to order a bankrupt to submit to an examination for the purpose of an insurance on her life. It is submitted that such an act may be reasonably required by the trustee under s. 24 of the Bankruptcy

(1) 16 Q. B. D. 698.

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

Act, 1883, sub.-s. 2 (1); and further, that it is aid in the realization of the property and distribution of the assets among the creditors which the bankrupt ought to give under sub-s. 3, and that *In re Garnett, Ex parte Bullock* (2) ought not to be followed. But supposing there is no power to make an order on the bankrupt to do such acts, yet his not doing them ought to be considered on the application of the bankrupt for an order of discharge under s. 28 (3), and either some condition attached to the discharge, or at the least it should be suspended for more than the mere nominal period of six months.

The bankrupt appeared in person.

Cur. adv. vult.

LORD ESHER, M.R. This case came before the registrar under s. 28 of the Bankruptcy Act, 1883, on an application to discharge the bankrupt. The registrar postponed the discharge on other grounds, but he was asked to further postpone it or to refuse it

(1) Sect. 24 enacts: "(1.) Every debtor against whom a receiving order is made shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require.

"(2.) He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such time on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official receiver, special manager, trustee, or any creditor or person interested."

"(3.) He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds among his creditors."

(2) 16 Q. B. D. 698.

(3) Sect. 28 enacts: "On the hearing of the application" (by the bankrupt for an order of discharge) "the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property."

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

Lord Esher, M.R.

altogether on account of the conduct of the bankrupt, who had declined to submit to be examined by the medical man of an insurance company. This examination was necessary to enable the trustee to effect an insurance on the life of the bankrupt, and so the better to sell and realise a reversionary interest which was in him. The registrar thought that he could not take this into consideration. Upon this there is an appeal, in which it is said that the registrar ought to have taken this matter into consideration, and that if he had he would probably have refused the discharge, at all events until the bankrupt submitted himself to the examination.

What we have to determine is the true construction of the statute as applied to this case. It is said that what the bankrupt was asked to do was something which he ought to have done "in relation to his property and the distribution of the proceeds," and that the request to do it was reasonable. Now the conduct which is to be taken into account under s. 28 in determining whether the bankrupt should be discharged, if it be not one of the matters specified in that section, must be something described in s. 24, and therefore we have to consider what that section directs that the bankrupt may be ordered to do. Looking at sub-s. 4 of the section, it is obvious that this is a serious matter, for if the conduct of the bankrupt here was a failure to perform a duty imposed by the section, then since it was undoubtedly wilful it was a contempt of Court, and rendered him liable to be imprisoned till he purged his contempt. I think where such a power is given one must expect the act the commission or omission of which is to entail such a penalty to be clearly explained and defined.

This leads me to deal with the facts here. The bankrupt was desired to submit to a medical inspection as a necessary condition to a policy being effected on his life. The ground for this application was that a reversionary interest which depended on his outliving his mother could more readily be sold. That policy, if it were effected, never would be his property; it would be the property of the official receiver or trustee, and it would be effected in order to be sold or assigned to the purchaser of the reversionary interest, so as to add a value to that. Therefore

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

Lord Esher, M.R.

the bankrupt is required to do this act for the formation or invention of a piece of property which would not be his at the time when it was made or at any time afterwards. The policy is no part of his property, and therefore what he is asked to do in relation to that policy is not anything in relation to his property or the distribution of it, and so cannot be brought within this section.

The case of *In re Garnett, Ex parte Bullock* (1), was cited to us, and to me it seems that if we grant this appeal we shall overrule that case. It seems to me impossible to say that if this case is within the Act the bankrupt could not be directed to do this thing, and on his refusal pronounced guilty of contempt. In the case cited, Cave, J., held that he could not make such an order or treat the refusal to do such a thing as a contempt. He came to that conclusion on the grounds on which I arrive at a conclusion in this case, namely, that it is not within s. 24. To hold otherwise would I think be carrying the Court into extreme danger of applying the section to acts very different from the mere ministerial acts which a man would do with regard to his property if he had to realise it, such as signing a deed. I think the general words of the section are not applicable to this case, and that the learned registrar was right, and that the appeal should be dismissed.

FRY, L.J. In this case I have the misfortune to differ, not only from my learned Brethren, but also from the opinion expressed by Cave, J., in *In re Garnett, Ex parte Bullock.* (1) I need hardly say, therefore, that the conclusion at which I have arrived is one which I hold with great distrust, but having arrived at that conclusion, after the best thought I can give to the matter, I think it is my duty to express my opinion. That opinion is arrived at in this case from the particular facts of the case, and I do not propose to lay down any general rule with regard to the duties of a bankrupt under somewhat similar circumstances.

The facts of this case are shortly these. The bankrupt is a man who has incurred in his trade very considerable debts. He is possessed in substance of one asset, and only one, which is a

(1) 16 Q. B. D. 698.

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

FRY, L.J.

contingent residuary property dependent on his surviving his mother, he being twenty-four years of age and his mother being sixty-nine years of age. The property, therefore, is of a kind the value of which depends upon the health and prospects of life of the two persons whose lives are concerned in the contingency. It is further in evidence, or has been admitted, that the bankrupt himself, some time before his bankruptcy, proposed to raise money upon this property, and he then submitted himself to a medical examination with a view of obtaining a policy to secure the property against the contingency of his dying before his mother, subsequently to that the bankruptcy ensued, and the assets leave a very considerable sum payable to the creditors. The bankrupt himself has stated that he has contracted no disease since the time when he submitted to his medical examination, and there is nothing which has happened since which can create any difference in his reasonable willingness to be examined. That I think is the result of the evidence. The trustee has received an offer from an intending purchaser who is willing to give 800*l.* for this contingent reversionary property in case a policy can be effected against the contingency of the bankrupt dying before his mother. But the bankrupt, without assigning any reason, or suggesting that any reason exists, declines to submit himself to a medical examination.

We have to apply these facts to the language used in the 24th section of the Bankruptcy Act, which defines the duties of a debtor. It appears to me that the legislature has in that section used words which shew an anxious desire to express the greatest generality. To prevent its being supposed that the acts and things in relation to the property are necessarily of the same kind as the express acts which are defined previously, we have the word "generally" introduced, which rebuts any such inference. The acts may be reasonably required, not only by the official receiver or trustee, but may be prescribed by general orders or by a particular order made in a particular case. The acts which are to be done if required are "such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may reasonably be required." On that two questions arise, is this an act in relation to his property? It

1887.

IN RE BETTS. EX PARTE BOARD OF TRADE.

Fry, L.J.

appears to me that it is. The value of the property depends upon the life of the bankrupt. It is property which can be realised for a far larger sum if an indemnity can be provided against the particular contingency than if that contingency is not provided for. The thing to be done relates to the property, because it fills up a possible contingency which may render it valueless. That is my view of the application of the words of the Act to this particular case. But then the act must be one which is reasonably required. I think an act which may be reasonably required is that which a reasonable man may be willing to do. Would a reasonable, honourable-minded man be willing to do this? Would he be willing, to enable the trustee to realise this amount, to submit himself to an examination, and so make this property (which in itself is comparatively valueless, but which if this policy is effected, would realise a considerable sum) more valuable for the payment of the debts he owes? It appears to me that in a case in which a few months before the bankrupt did submit to a medical examination, and has in effect told us that nothing has occurred since which can operate upon his mind to render it disagreeable to him, a reasonable man would do it. If a reasonable man would do it, a reasonable man might require it, and therefore in my judgment this is a thing which may be reasonably required and which every honourable man would be anxious to do. I confess it seems to me somewhat shocking that a bankrupt should, by merely setting up his disinclination, without any reason, to submit to a medical examination, be able to deprive his creditors of the greater portion of a valuable asset.

But the matter does not entirely rest there, because in sub-s. 3 of s. 24 we have another duty defined: "He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property." How does any reasonable man attempt to realise a contingent reversionary property of this sort? We have an example in the conduct of the bankrupt himself in respect to this very particular property before his bankruptcy; but if we had not that, everybody knows that such property is always realised if possible together with a policy which is to provide an indemnity against the contingency which would deprive the assign of the value of the property. In this case all the assign

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

Fry, L.J.

requires is, that he and not the trustee may be in a position to take out the policy when he has bought the reversion. The language of the legislature is studiously general. The bankrupt is to "aid to the utmost of his power in the realisation of his property." Now would any person realising his property to the utmost of his power submit to this particular examination or not? The answer which I make to that is that he would.

I will now consider the alternative results of the two interpretations. On this one hand there is the result, that if I am right the bankrupt might be committed to prison for not submitting to this medical examination. Let me observe I am not speaking of the medical examination of a person who says he has a reason why he does not desire to be examined. In this case the bankrupt has told us that no such reason exists. Is there any reason why a person who wilfully refuses to aid in the realisation of his property in the best way, and for no motive, should not be sent to prison? For my own part I think this particular bankrupt, behaving in what appears to me to be a very dishonourable and unreasonable manner, would be for a time a very proper occupant of one of Her Majesty's prisons. On the other interpretation the result is, that this man, who has contracted these debts, and who owes a large sum of money which he cannot pay, and who has shewn that, when acting in his own interests, he had no objection to be examined by a medical man, is by reason of his present refusal able to deprive the estate of almost every penny which would otherwise go to the satisfaction of the creditors. I think that a much more unreasonable conclusion than that which would make the conduct of such a man a contempt of Court.

For these reasons I have come to the conclusion that this appeal should be allowed.

LOPES, L.J. This case depends upon what is the proper construction of two sections in the Bankruptcy Act of 1883, namely, the 24th section and the 28th section. The conduct which is complained of is, that the bankrupt has unreasonably refused to submit himself to a medical examination the object of which was to enable an insurance to be effected upon his life with a view to the more profitable realisation of his life interest in certain

contingent reversionary property. The registrar thought that he should not take into consideration this refusal as conduct justifying a suspension of the discharge under s. 28. It therefore becomes important to look at the terms of s. 28. In my opinion the word "conduct" in s. 28 does not include what I will call general misconduct. For instance it could not, I imagine, be said to include immoral conduct, however culpable, or however unreasonable. Nor again in my opinion would it include a breach of an obligation not connected with the bankruptcy, such, for instance, as a breach of promise to marry, however dishonourable and however unreasonable the conduct of the bankrupt in that respect might be. I think "conduct" in s. 28 must be construed by reference to s. 24 of the Act which defines the duties of the debtor "as to the discovery and realisation of his property." Now that being so, the question arises, is this refusal to submit to a medical examination by the bankrupt an act or thing in relation to his property contemplated by that section? In my opinion it is not. It is refusing to do an independent and collateral act by which his property may acquire an enhanced value. I cannot think that such an independent transaction was contemplated by this section.

But it is said that there are further words in s. 24 which strengthen the argument that has been used against the decision of the registrar. They are these: "He shall, if adjudged bankrupt aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds among his creditors." The effecting of an insurance is not, in my opinion, a realisation of property, being, as I have already said, an independent and collateral act by which the property is to acquire an enhanced value. It is also to be observed that if this not submitting to a medical examination is contemplated by these two sections, the debtor might be sent to prison. I cannot imagine for one moment that the legislature could have intended any such consequence to follow from such an act as not submitting to a medical examination.

The case of *In re Garnett, Ex parte Bullock* (1), which was a decision by Cave, J., under, I think I may say, precisely similar

(1) 16 Q. B. D. 698.

1887

IN RE BETTS. EX PARTE BOARD OF TRADE.

circumstances, has been referred to. I think that decision was right. I am therefore of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor to the Board of Trade.*

A. M.

May 25, 26, 27.

TUCK & SONS *v.* PRIESTER.

Copyright—Pictures—Infringement—Copies made before Registration—Sale after Registration—25 & 26 Vict. c. 68, *ss.* 1, 4, 6, 11.

The Copyright Act of 1862 (25 & 26 Vict. c. 68) applies only to statutory copyright, and gives no remedy for infringement of the common law right of property in works of art, which exists before publication.

The plaintiffs employed the defendant to produce copies of a drawing in which the plaintiffs had the copyright. The defendant without the plaintiffs' knowledge made other copies and imported them into England. Afterwards the plaintiffs registered their copyright. After such registration the defendant sold copies in England.

In an action to recover penalties under s. 6 and damages under s. 11 of 25 & 26 Vict. c. 68, for infringement of the plaintiffs' copyright:—

Held, that the statute gave no remedy for infringement of any common law right, that, by s. 4, the plaintiffs were not entitled to recover in respect of anything done before registration, that the sale, after registration, of copies made and imported before registration, was not unlawful, so as to give a right of action, and therefore the defendant was entitled to judgment.

ACTION to recover penalties and damages for infringement of copyright.

The plaintiffs were art publishers, and were assignees of the copyright in a water-colour drawing entitled "Sounding the Charge." In January, 1884, the plaintiffs employed the defendant, who was a printer carrying on business at Berlin, to produce 2000 copies of the drawing. The defendant executed the order, but also produced a number of copies on his own account, without the knowledge or consent of the plaintiffs, and some of the copies so produced were imported into England. Afterwards, on January 21, 1886, the plaintiffs registered their copyright in the drawing. After such registration the defendant sold copies of the drawing in England. The plaintiffs then commenced this

action, claiming penalties under s. 6, and damages under s. 11, of the Copyright Act of 1862 (1), in respect of the alleged infringement of their copyright.

(1) 25 & 26 Vict. c. 68: "Whereas by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended."

Sect. 1: "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph, which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death. . . ."

Sect. 2: "Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object."

Sect. 4 provides that a register shall be kept "wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act . . . and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

Sect. 6: "If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

Sect. 11: "If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor

BIBL. LOMIN

1887

TUCK v. PRIESTER.

At the trial Day, J., directed the jury to assess the penalties and damages separately. The jury found for the plaintiffs for 175*l.* penalties and 100*l.* damages. Day, J., held that the case did not come within the words "knowing that any such repetition, copy, or other imitation has been unlawfully made" in s. 6 of the statute, and therefore the defendant was entitled to judgment on the claim for penalties, but he gave judgment for the plaintiffs for 100*l.* damages.

The defendant now moved to enter judgment for him on the claim for damages, or for a new trial on the ground that the damages were excessive, and there was a cross motion to enter judgment for the plaintiffs for the penalties.

May 25, 26. *Reid, Q.C.*, and *H. Kisch*, for the defendant. The plaintiffs are not entitled to recover either penalties or damages. At the time when the copies in respect of which the action is brought were made and imported into England the plaintiffs' copyright had not been registered, and therefore by s. 4 of the statute (25 & 26 Vict. c. 68) they can have no right of action in respect of such making and importation. There is no cause of

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for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof; Provided that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity."

action in respect of the sale, after registration, of copies made before registration, for the plaintiffs' consent to the making of those copies was not required, and therefore such making was not unlawful, and s. 11 only prohibits the sale of copies unlawfully made.

Sir Edward Clarke, S.G. (*Cock, Q.C.*, and *McCall*, with him), for the plaintiffs. Both penalties and damages are recoverable. What the defendant did before registration was unlawful, for the plaintiffs had then a right, which the defendant wrongfully infringed. These copies were "unlawfully made" within the meaning of 25 & 26 Vict. c. 68, s. 6, and were "unlawful copies" within the meaning of s. 11, because when they were made there was a "subsisting copyright" in the plaintiffs within the meaning of those two sections. There is a copyright at common law, independently of statute, and the recital in the preamble to 25 & 26 Vict. c. 68, that authors had no copyright in their works, is incorrect: *Millar* v. *Taylor* (1); *Donaldsons* v. *Becket* (2); *Prince Albert* v. *Strange* (3); *Jefferys* v. *Boosey* (4); *Turner* v. *Robinson* (5); *Mayall* v. *Higbey.* (6) The plaintiffs are entitled to damages, and an injunction, and delivery of the copies, independently of the statute: *Hole* v. *Bradbury.* (7) The sale, which took place after registration, was clearly unlawful.

[DENMAN, J., referred to Tomlins' Law Dictionary, title "Copyright," and *Ex parte Beal.* (8)]

Reid, Q.C., in reply. The right which exists before publication, independently of statute (as in *Prince Albert* v. *Strange* (3)), is not properly described as "copyright." The confusion introduced by such a use of the word is pointed out in several passages in *Jefferys* v. *Boosey.* (4)

In the Copyright Act of 1842 (5 & 6 Vict. c. 45), s. 2, "copyright" is defined as "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied," and it ought to be construed in the same sense in 25 & 26 Vict. c. 68, where the Act of 1842 is expressly

(1) 4 Burr. 2303.
(2) 4 Burr. 2408.
(3) 2 De G. & Sm. 652; 1 Mac. & G. 25.
(4) 4 H. L. C. 815.
(5) 10 Ir. Ch. Rep. 510.
(6) 1 H. & C. 148.
(7) 12 Ch. D. 886.
(8) Law Rep. 3 Q. B. 387.

1887

TUCK v. PRIESTER.

referred to. If the word is construed as suggested on behalf of the plaintiffs the statute is inconsistent and unintelligible. The limitation of time imposed by s. 1 negatives such an interpretation, and so does s. 4, for it can never have been intended that the author's common law right before publication should be registered. Moreover the plaintiffs have not claimed in respect of any such right as is now suggested. The statement of claim complains of the infringement of the plaintiffs' copyright under the statute.

Cur. adv. vult.

May 27. GROVE, J. The plaintiffs have brought this action to recover penalties and also damages for infringement of their copyright in a drawing. The facts of the case, so far as they are material, are shortly these. The plaintiffs were entitled to the copyright in a drawing entitled "Sounding the Charge," and the defendant was employed to print a number of copies of this drawing for the plaintiffs. He executed the order, but he also printed a number of copies in addition to those which the plaintiffs had ordered, and these other copies were sent to England before the date of the registration of the plaintiffs' copyright in the drawing. After the registration of the plaintiffs' copyright, a number of these copies were sold in England by the defendant. The plaintiffs complain of what the defendant has done as an infringement of their copyright.

The question for decision depends on the construction of the statute 25 & 26 Vict. c. 68.

Sect. 6 of that Act gives the right to recover penalties for infringement of copyright in paintings, drawings, and photographs, and s. 11 gives a further right to recover damages. The plaintiffs claimed both, and the jury have found in their favour, for penalties amounting to 175*l.* and for 100*l.* as damages. Nothing now turns on the amount of the damages, for in order to avoid the necessity for a new trial it was agreed that the Court should deal with the question, and we think that the damages, if recoverable, should be reduced to 30*l.* The question is whether there has been any infringement by the defendant of the plaintiffs' copyright, according to the true meaning of the Act of Parliament to

1887

TUCK v. PRIESTER.

GROVE, J.

which I have referred. It is argued by the Solicitor-General that the preamble to the Act is wrong, and that the authors of paintings and drawings had copyright before the Act; he contends that at common law the designers of paintings and drawings had a prohibitory power which enabled them to prevent other persons from copying their works. The argument turns on the meaning of the word "copyright" in the statute, and on whether that expression includes a right which existed at common law or is confined to a statutory copyright. Day, J., has entered judgment for the defendant as regards the claim for penalties, because he considered that there was no evidence of knowledge to bring the case within the words which occur in s. 6, "knowing that any such repetition, copy, or other imitation has been unlawfully made." Those words, however, do not occur in s. 11, and Day, J., was of opinion that the plaintiffs could maintain their claim for damages.

I am of opinion that the defendant is entitled to judgment as to both claims.

It was contended by the Solicitor-General that the Act of Parliament comprehended a common law right, which existed in the proprietors of paintings and drawings, to prevent their use for public and general purposes; but I think that the term "copyright" applies to the statutory right to a monopoly after publication. It is an exclusive right to copy and to assign the right, lasting only for a limited time, and in my opinion it does not apply to what I think is erroneously called common law copyright. The word, so far as I am aware, did not exist as descriptive of any right at common law, though for convenience' sake it has sometimes been used to describe such a right. The view which I take as to this is supported by the opinions of many of the judges who have had to consider the question.

Supposing then that the term "copyright" is confined to statutory copyright, it follows that there is no misrecital in the preamble to the statute, for the word as there used does not apply to any right which existed at common law. There is also a strong indication of the meaning of the statute in the words of s. 2: "Nothing herein contained shall prejudice the right

1887

TUCK v. PRIESTER.

Grove, J.

of any person to copy or use any work in which there shall be no copyright." I find the whole statute consistent in using the word in the limited sense, but if the other meaning is adopted its provisions are inconsistent and repugnant. It seems to me, therefore, that in this statute the word "copyright" means statutory copyright.

The point was discussed in the House of Lords in the year 1854, in the case of *Jefferys* v. *Boosey*. (1) The view of Lord Brougham and Lord St. Leonards is thus stated in the head-note to the report: "Copyright did not exist at common law; it is the creature of statute." That perhaps is inaccurate when stated as a general proposition; but it shews that the word is there used in the sense of the right in published works. The judges in that case explain the difference in the use of the term. In delivering his opinion in the House of Lords, Erle, J., said: "The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation." (2) That statement seems to shew that an author's property in his works at common law is not copyright, for it distinguishes the two. Parke, B., said: "Whether such an exclusive right belonged to any one at common law is a question on which the highest authorities have differed. If it were necessary to give an opinion on that question, I should say that the rational view of the subject is most clearly against the existence of this right; and I believe that the weight of authority . . . . is likewise against it." (3) This is an expression of opinion that at common law there was no such right as the right then under consideration. Jervis, C.J., said: "I come now to the main question, which is one of considerable difficulty and great importance: has an alien resident abroad copyright in England? If he has, it must be by the common law or by statute, and upon each of these questions I will say a few words. It will be convenient, however, before I do this, to understand clearly what is meant by the word 'copyright,' for much confusion has prevailed during the argu-

(1) 4 H. L. C. 815. (2) 4 H. L. C. at p. 867.
(3) 4 H. L. C. at p. 920.

ment at your Lordships' Bar from a misapplication of this term. Mr. Bovill contends that the owner of a book or a manuscript has the same right as the owner of a chair or other personal chattel; he may keep it exclusively for his own use; he may give it or lend it to another, with a stipulation that it shall not be copied; and he argues that because these rights may be enforced in this country by a foreigner resident abroad a foreign author is therefore entitled to copyright. But this meaning of the word 'copyright,' viz., the right to the individual copy, has no application to the subject under discussion. Copyright here means the exclusive right of multiplying copies, which right does not attach to personal chattels; for although the owner of valuable inventions might at common law, and still may, under certain limitations, obtain the exclusive privilege of making them for public use, that right of monopoly springs from the prerogative of the Crown, and is not incident to the property itself." (1) In this passage the Chief Justice not only distinguishes the two meanings, but says that the meaning of the word as applied to the common law right has no application to the right created by statute. Lords Cranworth, Brougham, and St. Leonards, adhered to the same view. Lord Cranworth said: "In the first place then it is proper to bear in mind that the right now in question, namely, the copyright claimed by the defendant in error, is not the right to publish or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error here in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and therefore in determining its limits we must look exclusively to the statutes on which it depends." (2)

Lord Brougham in the same case said: "Whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it; but when he made the work public he resembled that owner after he had abandoned it, who could not

(1) 4 H. L. C. at p. 944. (2) 4 H. L. C. at p. 954.

1887

TUCK v. PRIESTER.

Grove, J.

directly prohibit passengers, or exact from them a consideration for the use of it." (1)

Further on Lord Brougham distinguishes the property in inventions from copyright, and, speaking of the mode of protecting inventions, he says, "But in what manner has this ever been done or attempted to be done by inventors? Never by asserting a property at common law in the inventor, but by obtaining a grant from the Crown." (2) Speaking of copyright in the sense of the exclusive right of multiplying copies of a work already published, he says: "That which was before incapable of being dealt with as property by the common law became clothed by the lawgiver's acts with the qualities of property; and thus the same authority of the lawgiver, but exercised righteously and wisely for a legitimate and beneficent purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence; and this protection is, therefore, in my opinion, the mere creature of legislative enactment." (3)

The opinion expressed by Lord St. Leonards is, if anything, stronger. He says: "Upon the claim of common law right, I confess I never have, at least for many years, been able to entertain any doubt. It is a question which I have often in my professional life had occasion to consider, and upon which I have arrived long since at the conclusion that no common law right exists after publication. . . . When we are talking of the right of an author we must distinguish (as has been already very accurately done) between the mere right to his manuscript and to any copy which he may choose to make of it, as his property, just like any other personal chattel, and the right to multiply copies to the exclusion of every other person. Nothing can be more distinct than these two things. The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, after he has published it to the world, is a totally different thing." (4) What he says is, that there is no

(1) 4 H. L. C. at p. 965.
(2) 4 H. L. C. at p. 966.
(3) 4 H. L. C. at p. 968.
(4) 4 H. L. C. at pp. 977, 978, 979.

copyright at common law, or in other words, that the common law right is not copyright, and that the word as used in the statutes applies in a narrower signification. The Solicitor General's argument in the present case rests on the existence of copyright at common law. He contends that the words "subsisting copyright," both in s. 6 and in s. 11 of the Act, mean copyright subsisting at common law, and that the plaintiffs had such a right. I am of the contrary opinion. I am of opinion that the Act does not apply to the common law right so as to give a statutory protection to such right. At common law a monopoly was given by the Crown. It was given wrongly, for the statute, 21 Jac. 1, c. 3, declared that it was unlawful; but the Crown gave the monopoly, and it is immaterial for the purpose of the present argument whether it was unlawful or not. I am of opinion that "subsisting" does not mean subsisting at common law. The recital in the Act that authors had no copyright shews what was meant. If the Solicitor General's argument is correct that recital is erroneous, otherwise it is right; and it should not be read so as to make it wrong where it can be read so as to make it right. Sect. 4 is the turning point of the decision; for the first time that section enacted that there should be a register of the proprietors of copyright in paintings and drawings, the object being to establish a record of the persons claiming copyright in such works, so as to enable the public to ascertain who has the copyright. There has been some criticism on the words "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration." I think that means copyright to which the Act applies, and the clause shews that nothing can be claimed for any act done before registration; otherwise the section would give a penalty ex post facto for doing that which was lawful when it was done, that is, before registration. If a proprietor of copyright can delay registration, and allow the public to have the free use of his drawing, and allow tradesmen to reproduce it, and exhibit it for sale, and invest their money in it, and can then register, and say that such reproduction has now become unlawful, and can bring an action for damages under s. 11, and enforce delivery of all copies, and can also sue for penalties under s. 6, and claim that all copies be

1887

TUCK v. PRIESTER.

Grove, J.

forfeited, the effect would be to encourage what might be a gross fraud, and what certainly would amount to gross negligence, on the part of such proprietor. My only doubt has been whether a person who has made copies lawfully before registration could afterwards sell them, when the copyright had been registered in the meanwhile; but I think the word "sell" in s. 11 goes with the other words, and that the sale which is prohibited must be a sale of something which was unlawfully made. These copies were not unlawfully made, for no consent was required at the time when they were made, because there had then been no registration, and therefore the defendant did not sell copies made without the consent of the proprietor within the meaning of the Act, because when the copies were made such consent was not required, and therefore it was not unlawful to sell such copies. I confess I have no sympathy with the defendant, but we must construe the Act of Parliament according to what we consider to be its true meaning; and, for the reasons I have given, I am of opinion that what the defendant has done was not legally wrong, and therefore he is entitled to judgment.

The action was brought to recover penalties and damages within the meaning of the Act. The statement of claim does not claim in respect of a common law right, or a right under any other Act, but under this Act (25 & 26 Vict. c. 68). There was no necessity to register before the passing of this Act, and here nothing was proved to have been done after registration except the sale. The plaintiffs' claim is founded entirely on the statute, and if they fail to shew that the case comes within the statute, they cannot recover either penalties or damages. The sale here was a sale of copies which, so far as the Act goes, were lawfully made, having been made before registration, and therefore the case does not come within the Act, and the defendant is entitled to judgment.

DENMAN, J. My Brother Grove has dealt so fully with all the points raised that I will only add a few words.

On both points my opinion is in favour of the defendant.

It is clear that the action is founded wholly on the statute. The statement of claim alleges that the defendant copied the

drawing in which the plaintiffs had the copyright. I think that is not made out, for it is not proved that the plaintiffs were the registered proprietors of the copyright at the time when any copy was made.

The statement of claim further alleges that the defendant wrongfully sold certain copies. I think, on the grounds stated by my Brother Grove, that this allegation is not made out, because, according to the true construction, nothing was done by the defendant which the statute prohibits. The latter part of s. 4 is clearly opposed to the right of the proprietor of the copyright to sue in respect of the sale, after registration, of copies which were made before registration. The words are "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable, nor any penalty be recoverable in respect of anything done before registration." If the owner were entitled to maintain an action for the sale of copies, although he had not registered until after such copies had been made, he would get the benefit of the Act so as to recover in respect of that which was lawful at the time when it was done. The cause of action is complex; it is not only selling, but selling that which the plaintiff has the sole right to sell: but until registration there is no sole right to sell. There was no registered proprietor of the copyright at the time when the copies in question were made, and copies which are lawfully made are not to be forfeited because there has been a subsequent registration of the copyright in the original.

For these reasons I agree that our judgment ought to be for the defendant.

Judgment for the defendant.

Solicitor for plaintiffs: *Herbert Bentwitch.*

Solicitors for defendant: *Heath, Parker, & Brett.*

P. B. H.

1887
May 27.

MURRAY AND ANOTHER *v.* STEPHENSON.

Practice—Specially indorsed Writ—Time for Service—Order XX., r. 1; Order LXIV., r. 11.

A specially indorsed writ is not a pleading within the meaning of Order LXIV., r. 11, and service thereof may therefore be effected at any hour of the day.

MOTION on appeal from an order of Huddleston, B., at chambers, setting aside a judgment.

The plaintiffs issued a writ, specially indorsed under Order III., r. 6, which was served upon the defendant after the hour of two in the afternoon of a Saturday. On the following Monday week the plaintiffs signed judgment in default of appearance. The defendant applied to a master to set aside the judgment on the ground that his time for appearance had not expired, inasmuch as the writ was served after 2 P.M. on the Saturday, and, being a pleading, was by Order LXIV., r. 11, to be deemed to have been served upon the following Monday. The master refused the application, but, on appeal, Huddleston, B., set aside the judgment.

The plaintiffs appealed.

R. Bray, for the plaintiffs. It will not be disputed that an ordinary writ may be served at any time, and a specially indorsed writ is not a pleading within Order LXIV., r. 11, and is therefore subject to the same rules as to service as an ordinary writ. In none of the orders and rules is any distinction made between ordinary writs and specially indorsed writs, and writs as distinguished from pleadings are expressly mentioned in every rule which is intended to apply to them, as in Order LXVII. The indorsement of service upon a writ need not state the hour of service. Order XX., r. 1, which is relied upon by the defendant, only says that a special indorsement is to be deemed to be a statement of claim, not that it is one, and the recent case of *Veale* v. *Automatic Boiler Feeder Co.* (1) shews that it is not a pleading.

J. E. Raven, for the defendant. A specially indorsed writ is a

(1) 18 Q. B. D. 631.

pleading, because the indorsement is a statement of claim: Order XX., r. 1; *Robertson* v. *Howard* (1); *Fawcus* v. *Charlton* (2), *G.* v. *H.* (3). It therefore comes within Order LXIV., r. 11, and must be served before 2 P.M. on a Saturday. The interpretation clause of the Judicature Act, 1873, s. 100, says that "pleading" shall include any petition or summons.

MATHEW, J. This appeal must be allowed. We have now had the advantage of a more thorough discussion of this question than was possible in chambers. It is quite clear that a writ of summons may be served at any hour. In Order LXIV., r. 11, which provides for the service of certain documents, all mention of writs is carefully omitted, and therefore the old practice as to the time of serving writs still prevails. The defendant says that a specially indorsed writ is a writ plus a pleading, and therefore comes under Order LXIV., r. 11. If this were so, some very extraordinary consequences would ensue; an appearance to a specially indorsed writ would be equivalent to a statement of defence, and need not be entered for ten days, but the form in Appendix A., part 2, No. 2, provides for appearance within eight days. Further, if the defendant's contention is right, a specially indorsed writ cannot be served in the Long Vacation, because by Order LXIV., r. 4, pleadings cannot then be delivered.

A. L. SMITH, J. I am of the same opinion. The question is whether a specially indorsed writ is a pleading within the meaning of Order LXIV., r. 11. I am clearly of opinion that it is not, and I will only answer one or two arguments that have been urged by counsel for the defendant. He relied upon s. 100 of the Judicature Act, 1873, which says that "pleading shall include any petition or summons"; but the expression "summons" does not mean a writ of summons. He also urged that Order XX., r. 1, in terms made a specially indorsed writ a pleading, but that rule does not say that the indorsement *shall be* a statement of claim—only that it shall be *deemed to be* so. The provisions of rule 4 of

(1) 3 C. P. D. 280. (2) 10 Q. B. D. 517.
(3) W. N., 1883, p. 233.

1887

MURRAY v. STEPHENSON.

Order LXIV. shew conclusively that "pleadings" in rule 11 do not include specially indorsed writs, for it is impossible to suppose that it was intended that they should not be served in the Long Vacation.

Appeal allowed.

Solicitors for plaintiffs: *Elliot & Ash.*
Solicitors for defendants: *Gasquet & Metcalfe.*

W. A.

1887
June 7.

STOKES *v.* STOKES.

Practice—Jurisdiction—Transfer to County Court—Action for Slander—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 10—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 67.

Notwithstanding s. 67 of the Supreme Court of Judicature Act, 1873, which applies the provisions of s. 10 of the County Courts Act, 1867, to actions in the High Court in which relief is sought which can be given in a county court, there is still jurisdiction under s. 10 of the County Courts Act, 1867, to remit an action for slander to a county court.

APPEAL by the plaintiff in an action for slander from the order of Grantham, J., affirming an order made by the master, that in the event of the plaintiff failing to give security for costs the action be remitted for trial before a county court under s. 10 of the County Courts Act, 1867.

By the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 58, the county court is not to have cognizance of actions for slander.

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 10, power is given to the Court or a judge in actions in the Superior Courts, "for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort," where the plaintiff has no visible means of paying costs, to make an order that unless the plaintiff give security for costs, or shew that he has a cause of action fit to be prosecuted in the Superior Court, the cause be remitted for trial before a county court, which "shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court

should have power to try the said action, and the same had been commenced by plaint in the said county court."

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 67: "The provisions contained in the 5th, 7th, 8th and 10th sections of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a county court."

Cock, Q.C. (*C. G. Ellis*, with him), for the plaintiff. There was no jurisdiction to make the order, for the action is not one in which relief is sought which can be given in a county court, within the meaning of s. 67 of the Supreme Court of Judicature Act, 1873. Of the causes of action mentioned in s. 10 of the County Courts Act, 1867, four, viz., malicious prosecution, libel, slander, and seduction, are expressly excepted in s. 58 of the Act of 1846, which confers jurisdiction on the county courts. Therefore since the Judicature Acts, s. 10 of the Act of 1867 does not apply to these actions. Sect. 5 of that Act does not now apply to such actions: *Garnett* v. *Bradley* (1); and the same language is used in s. 67 of the Supreme Court of Judicature Act, 1873, with regard to s. 10 as is used with regard to s. 5. This view is supported by Lord Blackburn's judgment in *Garnett* v. *Bradley* (2), where he said, referring to s. 67 of the Supreme Court of Judicature Act, 1873: "That enactment therefore does not touch the cases in which a county court cannot give relief; and still, notwithstanding all that has been done, a county court cannot entertain an action of slander."

Rose-Innes, for the defendant, was not called on.

FIELD, J. I am clearly of opinion that this order ought to be affirmed. It was contended on behalf of the plaintiff that there was no jurisdiction to make the order. This contention is inconsistent with the clear and express language of s. 10 of the County Courts Act, 1867, but it is urged that that section is repealed, so far as it relates to certain actions, of which the action for slander is one. There is no express repeal, but it is argued that there is an implied repeal by s. 67 of the Supreme Court of

(1) 3 App. Cas. 944. (2) At page 971.

1887

STOKES v. STOKES.

Judicature Act, 1873. I am clearly of opinion that there is not.

MANISTY, J. I am of the same opinion. It is a startling proposition to say that the useful provisions of s. 10 of the County Courts Act, 1867, are impliedly repealed, and it would require unequivocal language to induce me to hold that they were. Sect. 67 of the Supreme Court of Judicature Act, 1873, applies the provisions of s. 10 of the County Courts Act, 1867, to all actions in the High Court "in which any relief is sought which can be given in a county court." Here the relief sought can be given in the county court, for, by the express provisions of s. 10 of the Act of 1867, when an action for slander has been remitted under that section the county court has jurisdiction.

Appeal dismissed.

Solicitor for plaintiff: *R. Chapman.*

Solicitors for defendant: *Lumley & Lumley.*

P. B. H.

April 5.

CUTLER *v.* NORTH LONDON RAILWAY COMPANY.

Carrier—Railway Company—Passenger's Luggage—Special Contract—Conditions of non-liability—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

The plaintiff was a season ticket holder on the defendants' line from B. to K. under a special contract, by which he undertook to abide by all the rules, regulations, and bye-laws of the defendants. One of such regulations was that the defendants would not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner. The plaintiff having with him at B. a bag which was not so addressed saw it labelled for K. by one of the defendants' servants; he left the train at C., an intermediate station, and proceeded to K. by a subsequent train; on his arrival at K. his bag was missing. There was no evidence that the bag ever reached K.:—

Held, that the regulation of the defendants was not a just and reasonable condition within s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and could not be enforced against the plaintiff:

Quære, whether the liability of the defendants in respect of the portion of the journey from C. to K. was that of common carriers or merely of gratuitous bailees.

MOTION for judgment. At the trial before the Recorder of London in the Mayor's Court the following facts were proved.

The plaintiff, who was a season ticket holder on the defendants' line of railway between Broad Street and Kew, came to the former station with a bag, which was labelled in his presence for Kew by one of the defendants' servants and was then handed to a porter and put on a barrow preparatory to being placed in the train for conveyance in the ordinary way. The plaintiff went by the train as far as Camden Town, an intermediate station on the defendants' line, where he got out, saying nothing about his bag. He proceeded to Kew by a later train. On asking for his bag at Kew, it was found to be missing, and the plaintiff was told that nothing had been put out from the train.

When the plaintiff originally applied to the defendants for a season ticket, he signed a special contract by which he agreed to abide by all the rules, regulations, and bye-laws of defendants, one of which was as follows: "In order to prevent delay and inconvenience on the re-delivery of luggage at the end of a journey, passengers are requested to place on each article their name and address, and notice is hereby given that the company will not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner." The name and destination of the plaintiff were not upon his bag. The learned judge nonsuited the plaintiff, giving him leave to move to set aside the nonsuit, and it was agreed that judgment should be entered for the plaintiff if the nonsuit was wrong.

Guiry, for the plaintiff. The regulation of the defendants is unreasonable; it is absolute in its terms, and would relieve the defendants of all liability for the loss of passengers' luggage, even though caused by the felonious acts of their own servants. If the regulation is unreasonable, the defendants were common carriers of the bag for the whole journey from Broad Street to Kew, and they are responsible as insurers. [He cited *Peek* v. *North Staffordshire Ry. Co.* (1); *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown.* (2)]

Candy, Q.C., for the defendants. The regulation is a just and reasonable condition within the meaning of s. 7 of the Railway and Canal Traffic Act, 1854. In any event, the defendants were

(1) 10 H. L. C. 473. (2) 8 App. Cas. 703.

1887

CUTLER v. NORTH LONDON RAILWAY CO.

not common carriers of the bag between Camden Town and Kew; the plaintiff having broken his journey by leaving the train at Camden Town, the defendants became mere involuntary bailees of the bag from there to Kew, and would only be liable on proof of gross negligence, of which there was no evidence. He cited *Patscheider* v. *Great Western Ry. Co.* (1); *Cooper* v. *London, Brighton and South Coast Ry. Co.* (2); *Great Western Ry. Co.* v. *McCarthy.* (3)]

HAWKINS, J. I am of opinion that the learned judge should have left the question of negligence to the jury. The first question that we have to determine is whether the defendants' regulation was valid, and as such capable of being enforced against the plaintiff; for if it is valid it affords a perfectly good defence to the action. It seems to me that its effect is to protect the defendants from obligations of any sort or kind in respect of passengers' luggage unless it bears the owner's name and destination; it does not except even the misconduct or felony of their own servants. I have no doubt that it is unreasonable, and that it cannot be enforced against the plaintiff by reason of s. 7 of the Railway and Canal Traffic Act, 1854.

Then comes the further question; assuming this to be an unreasonable stipulation, are the defendants liable on the facts of the case? If it is necessary for us to determine the question, I do not think that the defendants were responsible as common carriers for the loss of the bag under the circumstances of the case. They would no doubt have been so responsible if the plaintiff had travelled the entire distance direct from Broad Street to Kew, and the bag had been lost during the journey; but the plaintiff here did that which his season ticket contract did not entitle him to do; he got out at Camden Town, although one of the conditions of his contract was that he should only use his season ticket between the termini for which it was issued, and that if he got out at any other station he should pay his fare. The defendants were indulgent, and did not enforce their rights in this respect, but I hardly think they were liable as insurers of

(1) 3 Ex. D. 153. (2) 4 Ex. D. 88.
(3) 12 App. Cas. 218.

the bag for the latter portion of the journey; they were however liable at least as gratuitous bailees. Is there then any evidence to justify a finding that the defendants were guilty of negligence or of a want of care as gratuitous bailees? I think there was. It is true that on the arrival of the train at Kew there was no one there to receive the bag, but there was no evidence whatever to shew that the bag was ever landed there at all. I think therefore that there was evidence which ought to have been left to the jury, and that judgment should be entered for the plaintiff.

A. L. SMITH, J. I am of the same opinion. The defendants set up two defences; first, they say that the bag was carried by them under a special contract; and further they contend that after Camden Town it was not carried by them as common carriers, but at most as gratuitous bailees, and that there was no evidence of any negligence on their part. Now on the first point, the condition is not confined to misdelivery or delay, or even to certain cases of negligence; had it been so, I should not have said that it was not just or reasonable. It relieves the defendants of all liability whatever, even for the fraud, felony and wilful misconduct of their own servants, and I can imagine nothing more unreasonable than such a condition. As to the second point, I do not decide that the defendants were not common carriers of this bag. The case seems to me very like that of a passenger who sees his luggage placed in the van, and who through some accident is unable to get into the train, which goes off with his luggage. It is immaterial to decide which of these views is correct, but upon the special circumstances of this case I am willing to hold that the defendants only carried the bag as gratuitous bailees after passing Camden Town. Even on that assumption I think that a primâ facie case of negligence was made out which ought to have been left to the jury, and that the nonsuit was wrong.

Judgment for the plaintiff.

Solicitor for plaintiff: *Battams.*

Solicitors for defendants: *Paine, Son, & Pollock.*

W. J. B.

1887
May 14.

[IN THE COURT OF APPEAL.]

SETON, LAING, & CO. *v.* LAFONE.

Estoppel—Conduct—Negligent Representation—Proximate Cause of Loss—Wharfinger.

Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, and the defendant was not made aware of the mistake. The warrant had been negotiated, and was in January, 1886, in the possession of B. & E. In that month, no rent having been paid for the goods since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him, as the supposed holder of the warrant, and as the person presumedly interested in the goods, that the goods were in hand, that rent was due, and that, unless it was paid, the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. & E. and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession.

In an action to recover damages for a wrongful conversion of the goods:—

Held, affirming the judgment of Denman, J., that the defendant was liable, being estopped from denying that he had the goods specified in the warrant, because he had by his negligent misrepresentation led the plaintiff to believe that the goods were in his possession, and such misrepresentation was the cause of the plaintiff's loss, the plaintiff having purchased the warrant in consequence of the same.

APPEAL from the judgment of Denman, J., reported 18 Q. B. D. 139.

The facts sufficiently appear for the purposes of this report from the head-note and are fully set out in the report in the court below.

Cock, Q.C., and *Peile*, for the defendant. There was no relation between the defendant and the plaintiff which made it the duty of the defendant to take care that the statements of the letters should be accurate, or that entitled the plaintiff to assume that they were so for the purpose of the action that he took upon them. In order that an estoppel should be effected by such a representation, the maker of it must have contemplated or intended that the person to whom it was made should act upon it in the way in

which he has acted. It cannot be that the maker of the statement would be responsible in respect of any action which the person to whom it was made may have happened to take upon it, however wide of anything that he could possibly contemplate.

There was no evidence of any negligence on the part of the defendant. He acted bonâ fide on the entry he found in the books in ignorance of the mistake which had taken place. He was not bound as a matter of business before making the statement he did to look whether the goods mentioned in the entry were in the warehouse.

The action of the plaintiff in buying the goods was not the natural consequence of the defendant's statements. In order to create such an estoppel as this the negligence of the defendant must have been the proximate cause of the plaintiff's altering his position: *Carr* v. *London and North Western Ry. Co.* (1) Here the proximate cause of the plaintiff's purchase of the goods was his desire to obtain a good bargain.

[They cited *Dickson* v. *Reuter's Telegram Co.* (2); *Johnson* v. *Crédit Lyonnais Co.* (3); *Freeman* v. *Cook* (4); *Coventry* v. *Great Eastern Ry. Co.* (5)]

Finlay, Q.C., and *Pyke*, for the plaintiff, were only called on to argue the question whether the plaintiff's action in purchasing the goods was a natural consequence of the defendant's negligent misrepresentation. According to the true construction of the proposition with regard to estoppels of this kind in *Carr* v. *London and North Western Ry. Co.* (6) the question is rather whether the misrepresentation was calculated to induce the belief on which the plaintiff acted than whether it was calculated to bring about the particular act done by the plaintiff. It is not necessary that the defendant should contemplate the particular result produced.

[They cited *Ex parte Adamson* (7); *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Co.* (8)]

Cock, Q.C., in reply.

(1) Law Rep. 10 C. P. 307.
(2) 3 C. P. D. 1.
(3) 3 C. P. D. 32.
(4) 2 Ex. 654.
(5) 11 Q. B. D. 776.
(6) Law Rep. 10 C. P. 307, at p. 318.
(7) 8 Ch. D. 807.
(8) 5 Ch. D. 205, 217.

1887

SETON v. LAFONE.

LORD ESHER, M.R. Estoppels may arise on various grounds, all of which the judgment in *Carr* v. *London and North Western Ry. Co.* (1) endeavours to state, and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others. An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel. I do not think it necessary to go further into the various grounds upon which an estoppel may be raised, but will go at once to the proposition which appears to me to govern this case. It is laid down in the judgment in *Carr* v. *London and North Western Ry Co.* (1) that "if, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to shew that the state of facts referred to did not exist." The meaning of the term "proximate" in that proposition has been discussed during the argument. Before framing the propositions in *Carr* v. *London and North Western Ry. Co.* (1) I had referred, I think, to nearly all the cases on the subject, and sought to derive from them the different propositions relating to the law of estoppel. The word "proximate" was taken from the judgment in the case of *Swan* v. *North British Australasian Company.* (2) In that case, Mellor, J., said that the question was what was the culpable conduct which had been the proximate cause that the defendants had registered a forged transfer as genuine; and that the false representation was that of the broker and not of the plaintiff, and the proximate cause which induced the company to alter

(1) Law Rep. 10 C. P. 307. (2) 2 H. & C. 175.

1887

SETON v. LAFONE.

Lord Esher, M.R.

their position to their prejudice was the fraudulent and felonious conduct of the broker and not the negligence of the plaintiff. In the same case, Blackburn, J., said, "What I consider the fallacy of my Brother Wilde's judgment is this: he lays down the rule in general terms "that, if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards as against such persons to shew that state of facts did not exist." This is very nearly right, but in my opinion not quite; as he omits to qualify it by saying that the neglect must be in the transaction itself and be the proximate cause of the leading of the party into that mistake." It was on the strength of these observations that I put the word "proximate" into the proposition which I have quoted. I think it is clear on reference to the facts of *Swan* v. *North British Australasian Company* (1) that the word "proximate" was there used as meaning the "real" cause. It was, no doubt, true in that case that there had been negligent conduct by the plaintiff which was in one sense a cause, but was not the real cause, of the defendants' action, because it would have had no effect unless there had intervened the fraudulent and felonious act of the broker. The meaning read by the light of those facts is clear enough, but I think I should prefer to insert in the proposition the word "real," instead of the word "proximate." The argument of the defendant's counsel appears to suggest that the proposition is itself inaccurate. It was taken from the proposition laid down by Wilde, B., as corrected by Blackburn, J., in *Swan* v. *North British Australasian Company* (1), which case was decided by the Exchequer Chamber, and is therefore binding on us; and further, in the case of *Coventry* v. *Great Eastern Ry. Co.* (2) this Court adopted the proposition laid down in *Carr* v. *London and North Western Ry. Co.* (3) It has therefore been twice recognised in a Court of Appeal: and I think we must take it to be a correct proposition of law; and the question is therefore whether this case comes within it. The defendant makes a statement: it is a statement made in the course of business: it is a statement

(1) 2 H. & C. 175. (2) 11 Q. B. D. 776.
(3) Law Rep. 10 C. P. 307.

1887

SETON v. LAFONE.

Lord Esher, M.R.

made by a wharfinger for the purposes of his business; the substance of it being that certain dye is in his warehouse under his charge as a warehouseman; that the warrants for it are outstanding, and therefore upon the production of them the dye will be delivered; and that the plaintiff is interested in the dye and the holder of the warrants and therefore bound to pay the rent and, if it is not paid, the goods will be sold. The statement that the dye is in his warehouse being erroneous, the next question is whether it was negligently made. The goods were deposited in the warehouse long before the defendant became owner of it, a fact he would ascertain from the books. There is nothing to shew that he took any pains to ascertain or made any inquiry whatever whether, after that long interval, they were still in the warehouse. The part of the warehouse in which the goods were deposited would appear from the books, and it would have been very easy to make such inquiry; but without doing so he takes upon himself to make this statement.

It is alleged that there was no negligence, because there was no duty. I protest that, if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and, further than that, I think there is a duty to take reasonable care that the statement shall be correct.

It is not stated to be necessary by the terms of the proposition to which I have referred, and I do not think it is necessary, that the person making the statement should have intended the person to whom he made the statement to act in any particular way upon it. The learned judge thought there was negligence, and I think he was justified in so finding. Then the statement being negligently made, the next question is, whether the plaintiff believed it. The learned judge below finds that he did, and it seems to me that the obvious inference from the facts is that he did so. Then the next question is, whether the statement was calculated to make him believe in a certain state of facts, and in consequence do what he did upon the strength of that belief, or, to put what seems to me to be the same question in

other words, whether it was reasonable as a matter of business for the plaintiff to do what he did as a result of his belief in the defendant's statement. It seems to me that the natural result of the defendant's statement is the conclusion in the plaintiff's mind that if he buys the warrants he can get the goods, and that he would buy the goods if he thought he could get a good bargain by so doing.

The learned judge has in effect found that it was not an unnatural result as a matter of business of the defendant's statement that the plaintiff should try to make a profit by buying these goods. There seems to me to be no reason for questioning that finding. Under these circumstances, it appears to me that the case is in every respect brought within the terms of the proposition which has twice been laid down by a Court of Appeal, and that for these reasons this appeal must be dismissed.

FRY, L.J. I also think that the judgment of the learned judge was correct. The law must be taken by this Court as laid down in *Carr* v. *London and North Western Ry. Co.* (1) in the proposition which has been so much discussed during the argument. That proposition was approved in the case of *Coventry* v. *Great Eastern Ry. Co.* (2), and is therefore not now open to discussion. The inquiry must simply be whether this case comes within that proposition; whether the defendant has by certain misstatements made by him and believed by the plaintiff induced the plaintiff to act in a certain way, and whether his conduct in making those misstatements was culpably negligent. When I say culpably negligent, of course I do not mean to suggest any personal negligence on the defendant's part, but only culpable negligence on the part of his servants, for which he would be responsible. If very slight care had been taken to verify the statement in the books, it would have been discovered to be wrong. It seems to me clear that there was evidence of negligence. Then was the representation calculated to produce the belief that it did produce? It seems clear that it was. The next question is whether the culpable negligence of the defendant

(1) Law Rep. 10 C. P. 307. (2) 11 Q. B. D. 776.

1887

SETON v. LAFONE.

Fry, L.J.

was the proximate cause of the plaintiff's being led to act as he did. That is the question which has presented the greatest difficulty to my mind. The cause is not the less proximate because the defendant may not have contemplated the effect. The inquiry whether the statement was the proximate cause does not depend on the intention of the party making it. In order to ascertain whether a statement by one person has brought about the action of the other, you must look at the condition of mind and circumstances of the person to whom the statement was made not of the person who made the statement. I will not attempt to give any paraphrase of the word "proximate." The doctrine of causation involves much difficulty in philosophy as in law: and I do not feel sure that the term "real" is any more free from difficulty than the term "proximate." The learned judge found that the plaintiff had acted on the defendant's statement, and I do not differ from him on that or on any other of the points of the case. For these reasons I think the appeal should be dismissed.

LOPES, L.J. I entirely agree, and only wish to observe with regard to the proposition in *Carr* v. *London and North Western Ry. Co.* (1), to which reference has been made, that I agree with the Master of the Rolls in thinking that the term "real cause" would be a better term than "proximate cause" to use in that proposition.

Appeal dismissed.

Solicitors for plaintiff: *Irvine & Hodges.*

Solicitors for defendant: *West, King, Adams, & Co.*

(1) Law Rep. 10 C. P. 307.

E. L.

BARNACOTT, APPELLANT *v.* PASSMORE AND ANOTHER, RESPONDENTS. 1887

May 18.

Salmon Fishery Acts—Salmon Fishery Act, 1865 (28 & 29 *Vict.* c. 12), *s.* 30—*Salmon Fishery Act*, 1873 (36 & 37 *Vict.* c. 71), *s.* 36, *sub-ss.* 2, 4, 5—*Powers of Water-bailiff—Obligation to produce Instrument of Appointment.*

A water-bailiff appointed under the Salmon Fishery Acts, 1865, 1873 (28 & 29 Vict. c. 121, and 36 & 37 Vict. c. 71), is bound before attempting to exercise his power of searching boats, &c., used in fishing to produce the instrument of his appointment.

CASE stated by justices of Devon under 20 & 21 Vict. c. 43.

The respondents, two fishermen, were summoned by the appellant, a water-bailiff of the Tay fishery district, on an information under the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36, sub-ss. 2, 4, 5 (1), charging them with having resisted and obstructed the water-bailiff in the execution of his duty. The respondents admitted that they had refused to allow the appellant to search their fishing-boat, but it was urged on their behalf and admitted by him that he had not produced his instrument of appointment. On this admission by the appellant the justices dismissed the summons. The question for the opinion of the Court was whether they were right in so doing.

Willis Bund, for the appellant. The respondents at the hearing did not allege that they ever asked to see the appellant's instrument of appointment. Neither of the Acts contains a direction

(1) By the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 30, and the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36, sub-ss. 1, 2, 3, it is enacted that a water-bailiff duly appointed may, inter alia, "stop and search on any salmon river any boat, barge, coracle or other vessel used in fishing, or which there is reasonable cause to suspect contains any salmon, and seize any fish, instrument of fishing, or other article forfeited in pursuance of the Acts:" and that "any person refusing to allow any such boat, coracle or other vessel to be stopped and searched, or resisting or obstructing any water-bailiff in any such search" shall for every such offence be liable to a penalty. By the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 30, and the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36, sub-s. 4, it is enacted that every water-bailiff so appointed "shall be deemed to be a constable." By the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36, sub-s. 5, it is enacted that "the production by a water-bailiff of the instrument of his appointment . . . shall be a sufficient warrant for exercising the authorities given to him under the Salmon Fishery Acts, 1861 to 1873."

1887

BARNACOTT v. PASSMORE.

to the water-bailiff to produce the appointment. By both Acts the water-bailiff is constituted a constable, and Lord Coke says in *Mackalley's Case* (1) of a serjeant of the mace in London "without question the serjeant need not shew his mace; and if they should be obliged to shew their mace, it would be a warning for the party to be arrested to fly."

J. A. G. Hamilton, for the respondents. The terms of the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36, sub-s. 5, "the production by a water-bailiff of the instrument of his appointment shall be a sufficient warrant for exercising the authorities given to him under the statutes" render it essential that he shall produce his warrant of appointment before he proceeds to exercise the power of search with which the Act invests him.

LORD COLERIDGE, C.J. The magistrates were right in refusing to convict. The production by the water-bailiff of his appointment is the mode which the Salmon Fishery Acts prescribe of justifying his act. He has no authority until he shews his authority. The production of his appointment by the board of conservators is notice to the person against whom he is seeking to exercise the powers conferred upon him by the statutes, that he is a water-bailiff, and is intended to prevent resistance, and to put the offender from that moment in the wrong. Without proof of the production of his appointment by the water-bailiff any prosecution by him for penalties under the Salmon Fishery Acts must fail.

A. L. SMITH, J., concurred.

Order of justices affirmed.

Solicitors for appellant: *Surr, Gribble, Bunton & Gribble, for Bencraft & Bosson, Barnstaple.*

Solicitors for respondents: *Kennedy, Hughes & Kennedy, for W. P. Bencraft, Barnstaple.*

(1) 9 Rep. 69 b.

H. D. W.

GOODMAN *v.* BLAKE.
LAMBETH, CLAIMANT.

1887
May 18.

Practice—Interpleader—Charges of Sheriff subsequent to Interpleader Order—Right of Appeal under County Courts Act, 1850 (13 & 14 *Vict. c.* 61), *s.* 14.

In an interpleader proceeding on the application of the sheriff, the claimant, if successful, is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order.

The incidence of such charges is a matter of law and a proper subject of appeal from a county court to the High Court under the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14.

APPEAL from an order of the judge of the County Court of Whitechapel, varying an order of the registrar with respect to costs.

The sheriff of Middlesex having taken goods in execution in the above action in the High Court, the claimant claimed the goods under a bill of sale. On the application of the sheriff an interpleader order was made and the master transferred the issue to the County Court of Whitechapel for trial. The claimant was successful on the trial of the interpleader issue, and the goods seized were sold by the sheriff under an order of the county court. The registrar allowed to the claimant as costs against the execution creditor the charges made by the sheriff from the date of the interpleader order, viz., possession money and the expenses of the sale. On appeal the judge held that the claimant and not the execution creditor was liable in respect of these charges of the sheriff subsequent to the interpleader order.

W. E. Hume Williams, for the claimant. The order of the county court judge is not in conformity with the practice at chambers in the Queen's Bench Division as stated by Field, J., in *Searle* v. *Matthews*. (1) The execution creditor has the option

(1) See Weekly Notes, 1883, p. 176.

SEARLE *v.* MATTHEWS.
FOX & Co., CLAIMANTS.

THIS was a sheriff's interpleader summons upon which an order was made that the sheriff should withdraw. A question was raised as to what costs the sheriff was entitled to, and Field, J., said he would consider the matter and lay down a general rule. His judgment was as follows:

1887

GOODMAN v. BLAKE.

of withdrawing in favour of the claimant on the commencement of the proceedings in interpleader. If the execution creditor prefers not to do so and the claimant succeeds in making good his title, the cost of keeping the sheriff in possession after seizure and the expenses incident to the ultimate sale are properly regarded as costs in the interpleader issue to be borne by the unsuccessful execution creditor.

J. Watson, for the execution creditor, contended that the Court had not jurisdiction to entertain the appeal as it related to a mere question of costs, and did not involve any "determination or direction" of the county court "in point of law" within the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14.

THE COURT (Lord Coleridge, C.J., and A. L. Smith, J.) held that there was a right of appeal, as the order appealed against involved a question of legal principle, and that the rules of law

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"There have been recently before me several cases of interpleader, both by sheriffs and parties, in which the question raised has been whether the sheriff or the party interpleading is entitled to costs, and if so, at what point of time his right to them commences. The same question was brought before me several years ago when I was at Chambers, and I took pains to inquire what had been the practice as well in the Courts of Common Law as in the Court of Chancery. I have again made inquiries as to the practice, and the result has been that, although the practice at Chambers of this Division has to some extent varied, the general rule seems to be that which I am about to state, namely: where an order is made on the application of a sheriff, he is entitled to his costs from the period at which he has been called into interpleading action, that is to say, he is entitled, as against an unsuccessful claimant, to costs and possession money from the time of the notice of claim or from the time of sale, whichever would be first; and where a sheriff is ordered to withdraw, he is entitled to costs as against the execution creditor from the time at which the latter authorized the carrying on of the interpleader proceedings, that is generally from the return of the interpleader summons. In cases where an interpleader summons is taken out by the defendant in an action, he is entitled, on bringing into Court the amount claimed, to deduct from it the amount of his taxed costs up to that period, the question as to on which of the parties the ultimate liability for those costs is to fall being reserved. Of course these rules are general only; and if, in any particular case, the sheriff or party interpleading has unnecessarily caused any portion of the costs, he will not be entitled to recover and may be called upon to pay costs. Order: sheriff to withdraw, and to have his costs, as against the execution creditor, from the return of the interpleader summons.

applicable to the incidence of the sheriff's charges were correctly laid down in the considered judgment of Field, J., in *Searle* v. *Matthews* (1), and the claimant was entitled to recover the charges in question as costs from the execution creditor.

1887

GOODMAN v. BLAKE.

Appeal allowed.

Solicitor for claimant: *Newson.*

Solicitor for execution creditor: *Maskell.*

H. D. W.

[IN THE COURT OF APPEAL.]

May 21, 23.

BLAKE, APPELLANT; THE MAYOR AND CITIZENS OF THE CITY OF LONDON, RESPONDENTS.

Revenue—Landlord's Property Tax—Allowances—Public School—Charitable Institutions—5 & 6 Vict. c. 35, s. 61, rule VI.

By s. 61, rule VI., of 5 & 6 Vict. c. 35, allowances in respect of property tax, levied under Schedule A. of the Income Tax Acts, are to be made by the Commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises" belonging thereto, if occupied under certain specified conditions:—

Held (affirming the judgment of the Queen's Bench Division), that a school founded and carried on by the corporation of London under the provisions of an Act of Parliament, not for purposes of profit but for the benefit of a large portion of the public, and maintained partly by a charitable endowment, was a "public school" within the meaning of rule VI., notwithstanding the fact that the school was partly maintained by fees charged for instruction.

APPEAL from the judgment of the Queen's Bench Division (2) upon a case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the general purposes of the Income Tax Acts for the city of London.

The case raised the question whether the respondents were entitled to a certificate of allowance in respect of property tax under 5 & 6 Vict. c. 35, s. 61, rule VI., for duties charged under Schedule A. on the City of London School. The facts with regard to the institution and management of the school and its objects are fully set forth in the report of the case below.

The nature of the school may be briefly stated as follows: The school was founded under a private Act of Parliament, 4 & 5

(1) Weekly Notes, 1883, p. 176. (2) 18 Q. B. D. 437.

1887

BLAKE v. MAYOR, &c., OF CITY OF LONDON.

Wm. 4, c. 35, and provision was made thereby for a site and an endowment for the school out of the City estates; and it was provided that the Common Council might make such regulations for the management of the school as they should deem to conduce most to the extension of religious and useful education in the city of London. No profit had been made or sought by the corporation out of the schools, there being, on the contrary, a yearly deficiency of income to meet expenditure. The object of the school, as stated in the prospectus, was "to furnish a liberal and useful education for the sons of respectable persons engaged in professional, commercial, or trading pursuits without the necessity of removing them from the care and control of their parents." Boys were admitted on the recommendation of members of the corporation; and the annual charge for each pupil was 12*l.* 12*s.* up to the age of twelve, and 15*l.* 15*s.* after that age. The sons of freemen and of householders in the city of London had a preference for admission to the school. The Commissioners decided that the school was a public school within rule VI., and on the application of the appellant (the surveyor of taxes) granted a case.

The Queen's Bench Division (Denman and Hawkins, JJ.) affirmed their decision. (1)

(1) Rule No. VI. contained in s. 61 of 5 & 6 Vict. c. 35, specifies the "allowances to be made in respect of the said duties in Schedule A.," which allowances are (inter alia) as follows: "For the duties charged on any college or hall in any of the universities of Great Britain in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall and the gardens, &c.; or on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school, or almshouse and offices belonging thereto, and of the gardens, &c.; or on any building the property of any literary or scientific institution, used solely for the purpose of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise, provided also that the said building be not occupied by any officer of such institution nor by any person paying rent for the same."

Sir E. Clarke, S.G., and *A. V. Dicey*, for the appellant.

Sir C. Russell, Q.C., and *Pollard*, for the respondents.

The arguments and enactments referred to were substantially the same as in the court below.

[*Hall* v. *Derby Sanitary Authority* (1) was cited.]

LORD ESHER, M.R. I shall not attempt to give an exhaustive definition of the term "public school;" but I am of opinion that the City of London School is a public school within the meaning of rule VI. It is partly maintained by means of what was in its origin a voluntary charitable donation made by the corporation, but afterwards became an endowment provided for by an Act of Parliament evidently procured at their instance. The object of the school is the education of a sufficiently large number of persons to enable us to say that it is a public object. On those grounds I think that this school is of the same nature, so far as the question in dispute is concerned, as the college or hall in any of the universities of Great Britain mentioned in the earlier part of the rule. Under these circumstances, I do not think that the mere fact that a money payment is made by those interested in the persons to be educated prevents the school from being a public school within the meaning of the rule.

For these reasons, I think the judgment below should be affirmed, and this appeal dismissed.

FRY, L.J. I also think that the judgment of the Court below should be affirmed. We have to construe, for the purposes of this case, the term "public school," used in an exemption clause, which makes an exemption not only in favour of hospitals, public schools, and almshouses, but also in favour of any college or hall in any of the universities. We have therefore to read the term "public school" in connection with those other words. I agree entirely with the observations of Denman, J., in the Court below, where he says, "the intention seems to have been to exempt, not merely institutions which were purely charitable, but institutions ejusdem generis with the colleges and halls which form the first class of property exempted. There can be

(1) 16 Q. B. D. 163.

1887

BLAKE v. MAYOR, &C., OF CITY OF LONDON.

no doubt that the colleges and halls of the universities are not institutions wholly supported by charity. I think it is clear that the legislature did not intend the exemption to be in favour only of schools wholly supported by charity. The enactment seems to have been drawn with a mixed intention, viz. to exempt charitable institutions, and to exempt certain institutions partly depending on charity, perhaps in view of the beneficial character of the objects of those institutions." It seems to me that it would be unwise to endeavour to lay down any definition in the sense of saying what would or would not be a public school in all cases; but I think that the school in this case has certain characteristics which denote a public school. It has a perpetual foundation: a portion of its income is derived from charity: it is managed by a public body: no private person has any interest in the school: no profit was or is in the contemplation of its founders or managers: and, lastly, the object of the school is the benefit of a large class of persons. All these circumstances concurring, I think this institution may be said to be a public school.

LOPES, L.J. The question we have to determine is whether this particular school is a public school within the meaning of rule VI. I am of opinion that the legislature did not intend, when it used the term "public school" in the rule, merely a public school maintained solely by charity, and where education is given gratis. I do not propose to attempt to give an exhaustive definition, but I think the intention was to relieve schools not carried on for profit and in which the public were interested, because a sufficiently large number of the public received education there either gratuitously or to a great extent gratuitously. This school seems to me to come within that description. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor for Inland Revenue.*
Solicitor for the respondents: *The City Solicitor.*

E. L.

[IN THE COURT OF APPEAL.]

1887
March 30.

HAMILL *v.* LILLEY.

Practice—Appeals—Stay of Execution pending Appeal to House of Lords—Application, where to be made.

An application for a stay of execution pending an appeal to the House of Lords from the Court of Appeal ought in all cases to be made to the Court of Appeal.

ORIGINAL MOTION.

In an action of trover to recover from the defendant certain share certificates, the plaintiff, being a foreigner residing abroad, was ordered to give security for costs to the amount of 200*l.*

At the trial by Lord Coleridge, C.J., without a jury, judgment was given for the plaintiff.

The defendant appealed to the Court of Appeal, who affirmed the judgment of Lord Coleridge, C.J.

The defendant gave notice of appeal to the House of Lords, and subsequently obtained two orders from a master in chambers: (1) that the amount paid in by the plaintiff as security for costs should remain in Court until the hearing of the appeal by the House of Lords; and (2) that execution should be stayed on the defendant paying into Court 350*l.* on account of the costs of the appeal to the House of Lords.

A judge in chambers having affirmed both the master's orders, the plaintiff appealed to a Divisional Court, who reversed the decision of the judge in chambers, holding that neither the master nor the judge had jurisdiction to make the orders.

The defendant thereupon applied to the Court of Appeal for an order that the sum paid in by the plaintiff as security for costs in the action should remain in court until after the hearing of the appeal in the House of Lords.

March 23. *Henn Collins, Q.C.*, and *Hindmarsh*, in support of the application.

Murphy, Q.C., *Lumley Smith, Q.C.*, and *P. Gye*, contrà.

THE COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.) took time to consider what ought to be the practice in

1887

HAMILL v. LILLEY.

respect of making applications for stay of execution pending appeals from the Court of Appeal to the House of Lords.

Cur. adv. vult.

March 30. LORD ESHER, M.R., delivered the opinion of the Court as follows:—

Where there is an appeal to the House of Lords from a decision of this Court, whether we have allowed or dismissed the appeal to us, an application for stay of execution pending the appeal to the House of Lords, should, as a rule of practice, be made solely in this Court, and should not be made at chambers or in a Divisional Court.

Solicitors for the defendant: *Simpson & Co.*
Solicitors for the plaintiff: *G. S. & H. Brandon.*

W. A.

March 2; *April* 6.

IN RE PARKERS. EX PARTE SHEPPARD.

Bankruptcy—Breach of Trust—Partnership—Joint and several Contract—Joint and separate Proof—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), *s.* 37; *Sched. II., r.* 18.

Trust funds were handed by the trustees for investment to a firm in which one of the trustees was a partner. These funds were misappropriated by the firm, who subsequently became bankrupt:—

Held, that the trustees could, under Sched. II., r. 18, prove for the amount so misappropriated both against the joint estate of the firm and also against the separate estate of the defaulting trustee.

APPEAL against the rejection of a proof by the trustee under the bankruptcy of W. S. and F. S. Parker.

By deed dated July 31, 1876, W. S. Parker and two other persons were appointed new trustees of the marriage settlement of a Mr. and Mrs. Doxat. The deed of appointment was executed by W. S. Parker, who was a solicitor, and a member of the firm of W. S. and F. S. Parker.

In January, 1883, W. S. Parker and his co-trustees raised 15,000*l.* out of the trust estate by a sale of Consols, and paid the same to W. S. and F. S. Parker, as the solicitors of the trust, for the express purpose of being invested on mortgage of certain

1887

IN RE PARKER. EX PARTE SHEPPARD.

property, but the latter misapplied the money to their own use, and subsequently became bankrupt. J. E. Sheppard and two others were then appointed new trustees of the marriage settlement, and carried in a proof against the joint estate of W. S. and F. S. Parker for the 15,000*l.* and interest, and received two dividends thereon. They then carried in a proof against the separate estate of W. S. Parker for the 15,000*l.* and interest, which was rejected by the trustee in bankruptcy on the ground that as they had proved against the joint estate and received dividends they could not also prove against the separate estate of W. S. Parker.

Against this decision the trustees of the settlement appealed.

Bigham, Q.C., and *H. Reed*, for the appellants. This case is clearly within the 18th rule of the second schedule to the Act. The trustees under the settlement entered into two distinct contracts. One with W. S. Parker, their defaulting co-trustee, who executed the trust deed and received the money; the other with the firm of solicitors, who were intrusted with the money to invest. W. S. Parker was therefore liable on his separate contract, and also jointly liable as a member of the firm.

Lumley Smith, Q.C., and *R. Brown*, for the trustee in bankruptcy. It is settled law that there cannot be a double proof in respect of a contract: *Ex parte Barnewall* (1); *Ex parte Adamson.* (2) The 18th rule must be read strictly. Here there is no separate and distinct contract. Only one contract was broken by W. S. Parker, and that was his contract as a member of the firm. It is a mere incident that he also happened to be a trustee. As a trustee he no doubt committed a breach of duty, but that was not a breach of contract: *In re Davison.* (3) Further, the contracts intended by the 18th rule do not include breaches of trust; s. 37 of the Act draws a distinction between contracts and breaches of trust, and the rule is only aimed at commercial contracts. Here there was no separate contract by W. S. Parker so as to make him separately liable.

H. Reed, in reply. The cases cited do not apply. They were

(1) 6 D. M. & G. 795. (2) 8 Ch. D. 807.
(3) 13 Q. B. D. 50.

1887

IN RE PARKER. EX PARTE SHEPPARD.

cases of fraud. Every breach of trust is a debt arising out of contract: Lewin on Trusts, 5th ed., p. 188; and here the declaration in the deed amounts to an express covenant to perform the trusts: *Richardson* v. *Jenkins* (1); *Lord Mountford* v. *Lord Cadogan* (2), and is a contract entirely distinct from the contract by the firm. Why is the word "contracts" to be limited to contracts other than breaches of trust? Sect. 37 of the Act and the 18th rule are remedial enactments, and should be construed liberally. There is a distinction between s. 31 of the Act of 1869 and s. 37 of the present Act. The words "breach of trust" are added in s. 37, and no doubt were intended to meet to some extent the views expressed by Bramwell, L.J., in *Ex parte Adamson* (3); but that was a case of fraud.

Cur. adv. vult.

April. 6. CAVE, J., delivered judgment as follows:—

The question in this case is whether, where trust money is made away with by a firm, one of the partners in which is one of the trustees, proof can be made under rule 18 of the second schedule both against the joint estate of the firm and also against the separate estate of the member who is trustee.

So much as is material of rule 18 is as follows:—If a debtor was at the date of the receiving order liable in respect of distinct contracts as a sole contractor, and also as a member of a firm, the circumstance that the sole contractor is also one of the joint contractors shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts. W. S. Parker, one of the bankrupts, was one of the trustees under the marriage settlement of Mr. and Mrs. Doxat. The trustees placed some of the trust funds in the hands of the firm of Parker & Parker, of which W. S. Parker was a member, for investment, and that firm wrongfully converted the money to their own use. It is admitted that the trustees might prove against the joint estate for the loss sustained by their breach of contract in neither investing the money nor repaying it on demand. It is also admitted that, in the alternative, proof might be made against W. S. Parker's

(1) 1 Dr. 477. (2) 19 Ves. 633.
(3) 8 Ch. D. 807.

separate estate for loss sustained by his breach of trust. But it is contended that the case does not fall within rule 18, and that the trustees are put to their election and cannot prove against both. The trustee of the bankrupt's estate adopted this view, and, as proof had been made against the joint estate, he rejected the proof tendered against the separate estate of W. S. Parker, and this is an appeal against such rejection. The origin of rule 18 is to be traced to the decision in *Goldsmid* v. *Cazenove* (1), affirming the old rule against double proof. Shortly after that case was decided the Act of 1861 was passed, which by s. 152 permitted double proof in the case of joint and several bills of exchange and promissory notes. By s. 37 of the Act of 1869, which is in the same terms as rule 18 of the second schedule of the present Act, the new principle was extended to all contracts. The liability of a trustee in respect of a breach of trust was always provable in bankruptcy, as it is put by Jessel, M.R., as a liability arising from a contract to perform his trust, and not from pure tort: *Emma Silver Mining Co.* v. *Grant* (2); or, as it is put by James, L.J., as an equitable debt or liability in the nature of a debt: *Ex parte Adamson* (3); or, as it is put by Bramwell, L.J., "because I suppose trustees are held to undertake jointly and severally for the performance of their duties." Now, if this latter view is the right one, and there was a joint and several contract by the partners to invest or restore the money intrusted to them, the case falls within rule 18. I am not, however, prepared to adopt this view without further consideration; nor is it necessary to do so for the purpose of deciding this case. There was undoubtedly a joint contract by the partners to invest or restore the money, and this contract, which has been broken, gives rise to a joint liability. There was also a distinct liability of W. S. Parker founded on his duty as a trustee, a liability, as Jessel, M.R., says, arising from a contract which, as it is said in *Lord Mountford* v. *Lord Cadogan* (4), arises from undertaking the trusts. There were, therefore, in this case two distinct liabilities arising out of distinct undertakings, one, the joint liability of the firm arising out of the contract entered into or implied

(1) 7 H. L. C. 785.
(2) 17 Ch. D. 122, 130.
(3) 8 Ch. D. 807.
(4) 19 Ves. 637, 638.

1887

IN RE PARKER. EX PARTE SHEPPARD.

Cave, J.

when the money was handed to the firm for investment; the other, the separate liability of W. S. Parker arising out of the contract entered into or implied when he accepted the trusts of the marriage settlement. W. S. Parker was therefore at the date of the receiving order liable in respect of distinct contracts—one, as I have said, as a sole contractor when he accepted the trusts of the settlement, and the other as a member of the firm when the money was intrusted to the firm for investment; and the case therefore comes within the 18th rule.

The appeal must be allowed with costs, but the trustee may recoup himself out of the estate.

Solicitors: *Crosse & Son; Linklater & Co.*

H. L. F.

April 2.

IN RE TUFF. EX PARTE NOTTINGHAM.

Bankruptcy—Husband and Wife—Loan by Wife to Partnership in which Husband a Partner—Bankruptcy of Partnership—Wife's Proof against Joint Estate—Married Women's Property Act, 1882, *s.* 3.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3, any money of a wife lent by her to her husband for the purpose of any trade or business carried on by him shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount of such money after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied:—

Held, that where a wife lends her money to a trading partnership, of which her husband is a member, she is, notwithstanding the section, entitled to prove, on the bankruptcy of the partnership, against the joint estate in competition with other creditors.

APPEAL against the rejection of a proof by the trustee under the bankruptcy of Edward Tuff and Walter Nottingham.

On February 22, 1886, a receiving order was made against Tuff and Nottingham, trading in co-partnership as hardware factors under the style of Perkins & Co., and they were subsequently adjudicated bankrupt.

At the date of the receiving order the firm was indebted to Flora Nottingham, the wife of the bankrupt Walter Nottingham, in the sum of 500*l.* for moneys advanced by her out of her

separate estate to the firm, and secured with interest by the promissory notes of the firm. The moneys were applied in payment of the creditors of the firm.

Mrs. Nottingham carried in a proof against the joint estate of the firm for the 500*l.* and interest, which the trustee rejected, and thereupon she appealed against his decision.

F. C. Willis, for the appellant, contended that the facts shewed that the wife had not "lent money to her husband," within the meaning of the Married Women's Property Act, 1882, s. 3.

T. Lee Roberts, for the trustee. The case is within s. 3 of the Married Women's Property Act, 1882 (1), and is covered by the decision in *Ex parte District Bank of London*. (2) The money from beginning to end was lent to the husband and not to the firm. The advance was really intended for his benefit, and the terms of the section are wide enough to include the case of money lent to a husband who is a member of a firm. Although ostensibly advanced to the firm, it was none the less lent to the husband.

F. C. Willis, in reply. *Ex parte District Bank of London* (2) is distinguishable. The section only applies to the case where the husband is a sole trader, and does not prevent a wife from proving against the joint estate of a firm in which her husband is a partner.

CAVE, J. This is an appeal by the wife of one of the bankrupts against the rejection by the trustee of her proof against the joint estate of the firm. For the trustee, it was argued that the proof is obnoxious to s. 3 of the Married Women's Property Act, 1882. [The learned judge read the section, and continued:—] Now it must be remembered that previous to the passing, not indeed of that Act, but of what I may group together as the Married Women's

(1) 45 & 46 Vict. c. 75, s. 3: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

(2) 16 Q. B. D. 700.

1887

IN RE TUFF. EX PARTE NOTTINGHAM.

Cave, J.

Property Acts, the property of a married woman went to her husband, and what she earned or acquired, unless it was made her separate property in the manner recognised by Courts of Equity, also became the property of the husband, who might deal with it as he pleased. When the legislature, therefore, gave to the woman a property in her own earnings, or in other money which came to her during the marriage, and which was not settled for her separate use, it had to consider the case of what was to happen if the wife lent such money to her husband for the purpose of his trade or business; and, following out the principle which obtains in some of the cases, as, for instance, in the assessment under the Income Tax Acts, it identified the wife with the husband to this extent—that if she chose to make use of this power which was given to her and to say that the money was hers and must be treated as a loan to her husband, then that she, at all events, should be identified with him to such an extent that she should not be able to claim a dividend until the other creditors had received 20*s.* in the pound.

Now that section does not in terms apply to a loan by the wife to her husband and another when they are carrying on business together, and I do not see my way to extending it to such a case. It is not a case which is actually provided for in the Act; and with respect to cases which are not provided for in the Act, a married woman is to be capable of holding property, and contracting, as if she were a feme sole. Under those circumstances, supposing she had been a feme sole, and had agreed to lend her money to the firm of Tuff & Nottingham, it is quite clear that there was nothing to prevent her subsequently proving in the bankruptcy for loans made in that way. Then does the Married Women's Property Act, 1882, deprive her of that power. It does not appear to me that I can construe s. 3 as going to that extent. There is a general enabling power given by the Act to the wife, and I must construe that power to its full extent, except so far as it is cut down by the express language of the Act. Sect. 3 does not appear to me to cut down the power previously given to the wife to make a contract of this kind; and I think, therefore, that where there is a loan by the wife of a trader to the firm of which her husband is a member, that she may

1887

IN RE TUFF. EX PARTE NOTTINGHAM.

Cave, J.

prove in respect of such a loan. The circumstances of the two cases are entirely different. In the one case a woman lends to her husband, and to him only, he being the sole trader, and she will share with him in the whole of the benefits which will arise from the success of the trading. In the other, instead of being the sole trader he is one of a firm, one, it may be, of two or three, or it may be of ten or twelve, and it is obvious that her interest is totally different from what it was before. Before, she and her husband were together interested in the whole of the profits to be derived from the trade. In the case I have put her interest may become a comparatively minute one. She, no doubt, is interested in the success of her husband, and to that extent she will benefit by his success, but instead of having with her husband the whole of the profits of the trading venture, she, with her husband, will only enjoy that portion which the husband may be entitled to derive from the firm.

I should not, therefore, have expected, under those circumstances, to find this somewhat stringent provision enacted, and I do not think that it has been enacted. It seems to me s. 3 is so drawn as to apply only where the husband is the sole trader; and that, where he is trading in partnership with somebody else, the question which I shall have to ask myself in each case will be, whether there was really a loan to the husband in order that he might do what he pleased with it, contributing it to the firm or not as he thought proper, or whether it was a loan by the wife to the firm? In this present case I am of opinion that this was a loan by the wife to the firm, and that she is entitled to prove for it against the joint estate of the firm.

Order accordingly.

Solicitors: *Lake, Beaumont, & Lake; J. Tickle.*

H. L. F.

1887
May 6.

[IN THE COURT OF APPEAL.]

EX PARTE OFFICIAL RECEIVER. IN RE GOULD.

Bankruptcy—Administration of Estate of deceased Insolvent—Avoidance of Voluntary Settlements—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 47, 125.

Sect. 47 of the Bankruptcy Act, 1883, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy under s. 125 of the Act.

Decision of Cave, J., affirmed.

MOTION by the official receiver, as trustee of the estate of Charles Osborne Gould, who had died insolvent, to set aside a post-nuptial settlement executed by him. It appeared that Gould having died on April 17, 1885, insolvent, one of his creditors commenced an action in the Chancery Division for the administration of his estate, whereupon Pearson, J., made an order, under sub-s. 4 of s. 125 of the Bankruptcy Act, 1883, transferring the proceedings to the Court of Bankruptcy, and on February 15, 1886, an order for the administration of the debtor's estate in bankruptcy was made by that Court.

The official receiver, acting as trustee in the bankruptcy, applied to the Court, under s. 47 of the Bankruptcy Act, 1883, for an order setting aside a post-nuptial settlement executed by the debtor on November 24, 1880, on the ground that the settlor was, at the time when he executed it, not able to pay his debts without the aid of the property comprised in it. The trustees of the settlement raised the objection that s. 47 of the Bankruptcy Act, which makes void certain voluntary settlements executed by a bankrupt, had no application to the administration of the estate of a deceased insolvent in bankruptcy under s. 125.

Feb. 25, 26, 1887. *Bigham, Q.C., Muir Mackenzie,* and *A. G. McIntyre,* for the official receiver.

Winslow, Q.C., and *Yate Lee,* for the trustees of the settlement.

April 6. CAVE, J. The question in this case is whether s. 47 of the Bankruptcy Act, 1883, applies where the estate of a person

dying insolvent is being administered in bankruptcy under s. 125 of that Act. [The learned judge stated the facts as above, and continued:—]

By sub-s. 1 of that section the estate of the deceased debtor is to be administered "according to the law of bankruptcy." By sub-s. 5 the property of the debtor is to "vest in the official receiver of the Court, as trustee thereof," and he is forthwith to proceed "to realize and distribute the same in accordance with the provisions of the Act." By sub-s. 6 it is enacted that, "with the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." Part III. of the Act is entitled "Administration of property," and it includes s. 47; and Mr. Muir Mackenzie contended that sub-s. 6 is to be read as if it stood "all the provisions of Part III. of this Act, that is to say, of that part relating to the administration of the property of a bankrupt," shall apply. Mr. Winslow, on the other hand, urged that the sub-section should be read as if it stood "all such of the provisions of Part III. as relate to the administration of the property of a bankrupt" shall apply. The words are ambiguous, and are not incapable of being read in either way. It is, therefore, desirable to ascertain what was the condition of the law on the subject before the Act of 1883 was passed.

By the Judicature Act of 1873, s. 25, sub-s. 1, it was enacted that "In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." This enactment was repealed before it came into operation, but was re-enacted by the Judicature Act of 1875, s. 10. There was

1887

EX PARTE OFFICIAL RECEIVER. IN RE GOULD.

Cave, J.

much difference of opinion among the judges as to the effect of this section; but the better view seems to be, that the section merely introduced into the administration of an insolvent estate by the Court of Chancery the bankruptcy rule that a secured creditor could only prove for the balance of his debt after deducting the value of his security, and did not vary the assets, or bring into them anything which, apart from this section, would not have been assets: *In re Withernsea Brickworks* (1); *In re Maggi* (2); *In re D'Epineuil.* (3)

The last named case is important. It was there contended that the 10th section of the Judicature Act of 1875 applied the rules of bankruptcy so as to make an unregistered bill of sale void as against the unsecured creditors of an insolvent estate. But, said Fry, J., "the words of the section are, that the rules of bankruptcy are to be applied in the administration of the assets; the assets in this case include only the equity of redemption of the goods comprised in the bill of sale; that may be administered as part of his estate; what belonged to other persons cannot be so administered. . . . I grant this application on the ground that the section is not intended to enlarge the assets to be administered, but only to vary the rights of the persons entitled to the assets." Bearing this decision in mind, and turning to s. 125 of the Act of 1883, we find that the estate of the deceased debtor is to be administered "in bankruptcy," or "according to the law of bankruptcy." The trustee is to realize and distribute the property of the debtor according to the provisions of that Act. So far I find nothing indicating an intention to enlarge the assets to be administered, nothing to indicate that the scope of s. 125 of the Act of 1883 is larger in this respect than the scope of s. 10 of the Judicature Act of 1875. Then, coming to sub-s. 6, "all the provisions of Part III. relating to the administration of the property of a bankrupt shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." There, again, I find no clear indication of any intention to vary the assets; and, looking to the interpretation

(1) 16 Ch. D. 337. (2) 20 Ch. D. 545.
(3) 20 Ch. D. 217.

which had been placed in the cases I have cited on s. 10 of the Judicature Act of 1875, I certainly should have expected a clear indication, had it been intended to depart from the lines laid down in that Act, and to enlarge the assets to be administered. Part III. of the Act of 1883 is divided into five portions. The first, embracing ss. 37 to 42, is headed "Proof of debts." The second, including ss. 43 and 44, is headed "Property available for payment of debts." The third, extending from ss. 45 to 49, is headed "Effect of bankruptcy on antecedent transactions." The last two, comprising ss. 50 to 57, and 58 to 65, are headed respectively "Realization of property" and "Distribution of property." Speaking generally, there can, I think, be no doubt that the last two portions apply to an administration under s. 125, though, even in those portions, there are sections, such as ss. 52 and 64, which would not be applicable. The trustee is to realize and distribute the estate; and these are the portions of Part III. which apply particularly to realization and distribution.

The first portion, comprising ss. 37 to 42, also seems to be generally applicable, though here, too, there are sections as to which I entertain doubts. When, however, we come to the second and third portions, I feel a great difficulty in seeing how any of them can apply to the case of an administration under s. 125. I cannot see how ss. 43 or 44 can apply to such a case. Sects. 45 and 46 also seem inapplicable. Then we come to s. 47, the section sought to be applied in the present case. I confess I fail to see how a settlor can be said to have become bankrupt because he has died insolvent. Nor, again, can I understand how s. 48, avoiding fraudulent preferences, can be made to apply to a person dying insolvent. Had the legislature intended that these sections should apply, I should have expected to find some provisions shewing how they were to be applied.

It is not uninstructive to see how this difficulty is dealt with in other parts of the Act. Sect. 18 applies Part III. of the Act to compositions and schemes of arrangement, but without any such qualification as "all the provisions relating to the administration of the property of a bankrupt," and it contains an express provision that the terms "bankruptcy," "bankrupt," and "adjudication" shall include respectively a composition or scheme of

1887

EX PARTE OFFICIAL RECEIVER. IN RE GOULD.

Cave, J.

arrangement, a compounding or arranging debtor, and an order approving the composition or scheme. In this case how can it be said that Gould has become bankrupt within the meaning of s. 47, and from what date are the respective periods of two years and ten years to run? Sect. 125 furnishes no answer to this question. The deceased has committed no act of bankruptcy, and has not been adjudged a bankrupt. He was insolvent at the time of his death; but s. 125 nowhere says that dying insolvent is to be equivalent to becoming bankrupt. Still less possible is it to construe the order for administration as equivalent to the deceased's becoming bankrupt. Notice of the presentation by a creditor of a petition under s. 125 is, so far as the personal representative is concerned, and for certain purposes, to be deemed equivalent to notice of an act of bankruptcy; but it cannot be inferred from that that the presentation of the petition is equivalent to the deceased person becoming bankrupt, and still less that an application to transfer the proceedings to the Bankruptcy Court under sub-s. 4 has such an effect. Again, it would be anomalous that the assets of a deceased insolvent should vary according as his estate is administered in the Chancery Division or in Bankruptcy.

For these reasons I am of opinion that s. 47 does not apply to the case of an administration under s. 125, and I therefore dismiss the motion with costs.

H. L. F.

The official receiver appealed.

May 6. *Bigham, Q.C., Muir Mackenzie,* and *A. G. McIntyre,* for the appellant. Sect. 47 applies to the administration of the estate of a deceased insolvent in bankruptcy under s. 125. When an order for the administration of the estate of a deceased debtor made by the Court of Bankruptcy upon a transfer of proceedings for administration which have been commenced in another Court, sub-s. 4 of s. 125 provides that, "the like consequences shall ensue as under an administration order made on the petition of a creditor," and in that case sub-s. 1 provides that the petitioner is to pray for an order for the administration of the estate "according to the law of bankruptcy," and by sub-s. 2 the Court is to "make

1887

EX PARTE OFFICIAL RECEIVER. IN RE GOULD.

an order for the administration in bankruptcy" of the estate. By sub-s. 5, upon the administration order being made, the property of the debtor is to vest in the official receiver as trustee, and he is "to realise and distribute the same in accordance with the provisions of this Act." The effect of sub-s. 6 is to apply to the administration of the estate in bankruptcy all the provisions of Part III. of the Act, which includes s. 47. For this purpose the order of administration is equivalent to an adjudication of bankruptcy. Part III. of the Act is headed "Administration of Property," and that is a general description of the provisions of all the sections which are comprised in that part of the Act, and sub-s. 6 of s. 125 introduces all these provisions into the administration of the debtor's estate under that section. The property of a deceased insolvent cannot be administered until it has been ascertained of what it consists, and that is to be ascertained in the same way as in a bankruptcy. Sub-s. 11 of s. 125 gives power to make rules, and those rules when made are to have statutory force. By s. 168, sub-s. 1, "general rules" include "forms," and the form of administration order on a transfer of proceedings under s. 125, sub-s. 4 (No. 43 of Bankruptcy Forms, 1886) expressly provides that the estate "shall be administered according to the law of bankruptcy."

If only those sections included in Part III. of the Act which relate to the distribution of the bankrupt's property apply to an administration order under s. 125, sub-s. 6 was not required at all, for s. 10 of the Judicature Act, 1875, had already provided for that: *In re Maggi* (1). Sub-s. 6 was intended to give the creditors of a deceased insolvent the same rights as those which the creditors of a living bankrupt have.

Winslow, Q.C., and *Yate Lee*, for the trustees of the settlement. To hold that under s. 125 the Court is to administer for the benefit of the creditors of the deceased debtor not only his property, but also the property of third persons, would be to strain the words of s. 125. In the absence of clear words such a construction ought not to be adopted. The words of sub-s. 6 of s. 125, which incorporate the provisions of Part III. of the Act, are vero different from those of sub-s. 13 of s. 18, which make Part III. apply

(1) 20 Ch. D. 545.

1887

Ex parte Official Receiver. In re Gould.

to a composition or a scheme of arrangement of the affairs of a living debtor.

[They were stopped by the Court.]

Lord Esher, M.R. In my opinion this appeal must fail. I agree with every reason given by Cave, J., for his conclusion. But the main question, as he pointed out, is: What is "the estate" with which s. 125 is dealing? Is it only the estate of the deceased debtor, or does it include also the property of other persons? It is true that, though in a bankruptcy that which passes to the trustee is "the property of the bankrupt," the law of bankruptcy does deal with the property of other persons as if it were property of the bankrupt, but then the Act provides in plain terms that such other property is to be so dealt with. It has been pointed out to the legislature by the series of decisions upon s. 10 of the Judicature Act, 1875, that if at any time they should intend by such statutes as this to deal with the estates of other persons, besides that estate which is the main subject of the legislation, they must express their intention in plain terms, otherwise the legal effect of their enactment will be that it will not affect the property of other persons. In what I may call the bankruptcy part of the Act of 1883, the legislature, in s. 44, for instance, when they intend by the doctrine of reputed ownership to deal with the property of other persons as part of the property of a bankrupt, have said so in distinct terms. But, when they come in s. 125 to provide for the administration of the estate of a deceased debtor in bankruptcy, they have, as it would appear deliberately, left out the words necessary to include the property of other persons, and they have in every clause of s. 125 confined the subject-matter dealt with to "the estate of the deceased debtor." This is so in sub-ss. 1, 2, 4, and 5, in all of which the legislature seems to have wilfully omitted the words which, as had been pointed out to them by the decisions upon s. 10 of the Judicature Act, were necessary in order to include the property of other persons. Then sub-s. 6 provides that, "with the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an

administration order under this section in like manner as to an order of adjudication under this Act." That raises the question, which of the provisions of Part III. are applicable to an order for the administration of the estate of a deceased debtor? Sect. 47, which it is now sought to apply, does not apply to the property of the debtor, but to the property of the trustees of the settlement which it is sought to avoid, i.e., to the property of third parties. At the time of the debtor's death, the property comprised in the settlement was the property of the trustees, and not the property of the debtor. Therefore those provisions of Part III. which are contained in s. 47 are not "applicable" to an administration order under s. 125, because, according to the proper mode of interpretation, the property of the deceased debtor alone is dealt with by that section. It must be assumed that the legislature enacted the provisions of s. 125 with a knowledge of the decisions upon s. 10 of the Judicature Act, 1875. For the reasons given by Cave, J., every one of which I adopt, I think that this appeal ought to be dismissed.

FRY, L.J. For very many years before the passing of the Bankruptcy Act, 1883, the administration of the estates of deceased persons, whether they had died solvent or insolvent, had been carried on and directed by the Court of Chancery and its successor the Chancery Division of the High Court, and in such cases those Courts had been in the habit of administering only the property of the deceased debtor, not the property of other persons. Again, for many years before the Act of 1883 was passed, the Court of Bankruptcy had been in the habit of administering the estates of bankrupts, and in some cases of treating the property of third persons as part of those estates. A familiar instance of this was the case of the property of third persons which was in the order or disposition of a bankrupt as reputed owner. An express enactment to that effect is contained in s. 44 of the Act of 1883. So also the Act provides by s. 47 that certain voluntary settlements executed by a bankrupt shall be void as against the trustee in his bankruptcy. In some cases those settlements would have been void either at common law or under the statute of Elizabeth; in other cases they would have

1887

Ex parte Official Receiver. In re Gould.

Fry, L J.

been good but for s. 47. The old principle of administering as part of the estate of a bankrupt the property of other persons has been continued, and has in some cases been enlarged, by the Act of 1883. This being so, the legislature were minded to extend some of the provisions of the Bankruptcy Act to the administration of the estates of deceased insolvent debtors, and they have done so by means of s. 125; but throughout that section the subject-matter which is dealt with is "the estate of the deceased debtor," not the property of third persons. It is argued that the use of the words "administration according to the law of bankruptcy," in sub-s. 1, shew that "the estate of the deceased debtor" is to include the property of third persons. In my judgment those words apply only to the mode of administration, and not to the subject-matter which is to be administered. In my opinion, if it had been intended to arm the Court with the power of administering the property of third persons as part of the estate of a deceased insolvent debtor—a power which had never been possessed by the Court of Chancery—the legislature would have expressed their intention in clear and unambiguous language. On the contrary, the language which they have used goes, as it appears to me, quite in the other direction, and shews that they intended to deal with the property of the deceased debtor, and with nothing more. Sub-s. 6 is relied upon by the appellant. I agree that it means that all the provisions of Part III. of the Act are to apply to the case of an administration order under s. 125, but still they are to apply only "so far as the same are applicable." What is an "administration order?" It is "an order for the administration of the deceased debtor's estate," and of nothing else. So many, therefore, of the provisions of Part III. as are applicable to such an administration are imported into s. 125, and no others. Stated shortly, my conclusion is, that the legislature intended to enable the Court of Bankruptcy to make an order for the administration of the estate of the deceased debtor only, and we cannot extend the section to anything else.

Lopes, L.J. I cannot say that the terms of s. 125, and especially those of sub-s. 6, are as clear as they might have been, and for some time I had doubts as to the true construction. But I

have now come without any hesitation to the conclusion that the subject-matter which is referred to through the whole of s. 125 is the estate of the deceased debtor. In the absence of clear words to that effect, I cannot think that the legislature intended to include in the administration the property of other persons. It is not immaterial to look at the language of s. 44, which shews that, when the legislature intended to define "the property of the bankrupt" as including property of third persons, they did so with the utmost care, and this leads me to the conclusion that, if in s. 125 they had intended that "the estate of the deceased debtor" should include property of third persons, they would have said so in equally clear and unambiguous terms. By sub-s. 6 the provisions of Part III. of the Act are to apply to the case of an administration order "so far as the same are applicable," and in my opinion s. 47 is not applicable, because it deals with the property of third persons, not with that of the debtor. I think that the view of Cave, J., was right, and that the appeal must be dismissed.

Muir Mackenzie, asked for leave to appeal to the House of Lords.

The Court refused the application.

Solicitors for official receiver: *Smiles, Binyon, & Ollard.*

Solicitors for trustees of settlement: *Roopers & Whateley.*

W. L. C.

1887
May, 6, 13.

[IN THE COURT OF APPEAL.]

Ex parte BOARD OF TRADE. In re MUTTON.

Bankruptcy—Order of Discharge—Omission to keep "usual and proper books of account"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3.

By s. 28 of the Bankruptcy Act, 1883, it is provided that the Court shall refuse a bankrupt an order of discharge, or suspend the operation of the order, or grant a conditional order, upon proof "that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy."

A bankrupt, who carried on business as a hatter, bought some houses with the intention of selling them at a profit for building purposes, and also incurred liabilities in promoting an hotel company. He had kept proper books of account in relation to his business as a hatter, but he had kept no books in respect of his purchases of houses or of his transactions in relation to the hotel company:—

Held, by the majority of the Court of Appeal (Lord Esher, M.R., and Lopes, L.J.), affirming the judgment of the Queen's Bench Division, that the bankrupt was not required to keep any books relating to the building speculations, and that the omission to keep such books could not be taken into account as a reason for refusing or suspending his order of discharge:—

By Fry, L.J., that the building speculations were "business" transactions, and that the bankrupt was bound to keep books in relation to them.

Appeal from a decision of a Divisional Court affirming a decision of the judge of the Brighton County Court. (1)

The question was whether the bankrupt's order of discharge ought to have been refused, or suspended for a longer time, on the ground that he had omitted to keep proper books of account as required by s. 28 of the Bankruptcy Act, 1883.

The bankrupt carried on business as a hatter at Brighton, and the county court judge found as a fact that this was the only business which he had carried on. It was admitted that as regarded this business he had kept the usual and proper books of account, and that his accounts sufficiently disclosed his business transactions as a hatter, and his financial position, if certain speculations which he had made in house property were excluded. His books shewed that he had carried on the business of a hatter at a profit.

(1) 18 Q. B. D. 615.

Some years before the bankruptcy the bankrupt derived from his father some land with houses on it, at Brighton, and some land near Horsham. Prior to 1880 he had mortgaged both properties, and in 1880 and subsequently he bought some houses adjoining his Brighton property, and in order to pay for them he raised money by further mortgaging both properties. He made the purchases in the expectation of being able to sell all the Brighton property at a profit to some projected companies. In 1883 he incurred considerable liabilities in promoting an hotel company which was to buy his Brighton property, and in order to meet those liabilities he borrowed money at a high rate of interest from a money-lender. On May 24, 1886, a receiving order was made against him, and he was afterwards adjudicated a bankrupt. The formation of the hotel company was stopped, and the Brighton and Horsham properties were sold by the mortgagees for sums which did not cover the mortgage debts and the interest due on them.

The bankrupt had kept no book of accounts in respect of his purchases of houses, or of the liabilities which he incurred in attempting to float the hotel company. The official receiver reported, first, that the bankrupt had not kept such accounts as were usual and proper in the business carried on by him, and as sufficiently disclosed his business transactions and financial position; and secondly, that the bankruptcy had been brought about by rash and hazardous speculations.

The county court judge held that the bankrupt was only bound under sub-s. 3 (*a*) of s. 28 to keep usual and proper books of account in respect of his business as a hatter. But he suspended the bankrupt's order of discharge for twelve months, on the ground that the bankruptcy had been brought about by rash and hazardous speculations.

The Board of Trade, under rule 237 of the Bankruptcy Rules, 1886, appealed from the decision of the county court judge, on the question whether the bankrupt had kept proper books of account, with the view of obtaining a more severe sentence.

The Divisional Court (Mathew and Cave, JJ.) affirmed the decision. (1)

(1) 18 Q. B. D. 615.

1887

EX PARTE BOARD OF TRADE. IN RE MUTTON.

The Board of Trade (with leave) appealed to the Court of Appeal.

Muir Mackenzie (*Sir E. Clarke, S.G.*, with him) for the appellants. The bankrupt really carried on a separate business as a building speculator, and he ought to have kept books in respect of those transactions, otherwise the books which he did keep were misleading. His books ought to disclose his financial position generally. The mere fact that in any particular case it is not usual to keep books is not enough to excuse a man from keeping books. He is bound to keep the usual and proper books in every business which he carries on, if he carries it on with a view to profit, and his books ought to shew his financial position as regards his creditors generally, not only as regards his business. The object of keeping books is to enable a debtor to make a correct statement of his affairs in the event of his bankruptcy. The bankrupt ought to have kept a cash book and a ledger in relation to his speculations. He would have been bound to do this, even if he had not also been carrying on business as a hatter. The Bankruptcy Act, 1861, by s. 159 imposed a similar liability on traders, but the words "if a trader" are omitted from s. 28 of the Act of 1883, and the provisions of that section apply to non-traders equally with traders. The test is, whether the transactions have been carried on for profit, or only for pleasure: *In re Wallis.* (1)

The bankrupt did not appear.

Cur. adv. vult.

LORD ESHER, M.R. The bankrupt applied under sect. 28 of the Act for his discharge. The county court judge was of opinion that he had speculated rashly, and on that ground he suspended the order of discharge for twelve months. It was urged that the bankrupt had not kept the books of account which he ought to have kept, and that this fact ought also to be taken into consideration. The judge thought that he had no jurisdiction in the circumstances of this case to consider that matter. His decision was affirmed by the Divisional

(1) 14 Q. B. D. 950.

1887

EX PARTE BOARD OF TRADE. IN RE MUTTON.

Lord Esher, M.R.

Court, and now the case has been brought before us by way of appeal.

The bankrupt had been a hatter; that was his business. He had some land of his own, and in order to make use of it for building he purchased some other adjoining land, with the intention of selling the whole to a company, or to anyone who would give him a good price for it. His idea was to sell it once for all. He was not going to carry on the business (if there be such a business) of a speculator in land; he did not intend to buy land from time to time and to sell it from time to time. This was one single speculation with regard to his own land and the purchase of other land to add to it, in order to advance its value. On the one side it was argued that the bankrupt ought to have entered these transactions in his books. I do not know whether it was meant that he ought to have entered them in the books which he kept in his business of a hatter; but at any rate it was said that he ought to have entered them in some book or other.

On the other side it was said, that a man is only bound to keep books if he is carrying on a business in which it is usual to do so, and that then he is bound to keep the books which are usual in that business, and to keep them, in the usual manner. But with regard to that which is not a business matter there is nothing in the section to oblige him to keep books at all.

It was urged on the contrary, that s. 28 obliges everyone to keep books, whether he be a trader or not, and that if a man has not kept books shewing the state of his affairs he has done wrong. In answer to that it was said, that such a construction of s. 28 would revolutionise the social life of England, and that no one ever heard of English people keeping such books under such circumstances. The question is which of these views we ought to accept.

Sect. 28 provides that "the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge

1887

EX PARTE BOARD OF TRADE. IN RE MUTTON.

Lord Esher, M.R.

subject to such conditions as aforesaid." One of "the facts hereinafter mentioned" is, "that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy." As to the first part, I think it is not capable of a doubt that, if there are no "usual" books in the business which the bankrupt carries on, you cannot bring him within the words "such books of account as are usual and proper in the business carried on by him." The first thing mentioned is the kind of books which he is to keep,—such books as are "usual and proper in the business carried on by him,"—and the following words shew the manner in which he is to keep those books. It would be of no use to insist that he should keep books if he might keep them in any way he liked, and therefore the section goes on to say, "and as sufficiently disclose his business transactions and financial position." I cannot help thinking that all those words are joined together to describe the kind of books which he is to keep, and the manner in which he is to keep them under certain circumstances. If he is engaged in a business in which books are usually kept of a certain kind, he is to keep those usual books, but he is to keep them so as "sufficiently to disclose his business transactions and financial position." It seems to me that the only reasonable way of reading those words is, as meaning his financial position as a man of business. If you dislocate the words "financial position" from the others, you would, as I have already said, be causing a revolution in the social life of England. It would come to this, that everybody in the kingdom must keep books which will "sufficiently disclose his financial position." Before this statute no one ever heard of such a thing, nor was it even suggested until now that a person who is engaged in no business at all, that every man and woman over twenty-one years of age is to keep books which will shew his or her financial position. It seems to me that this would be a revolution, and I cannot agree that that is the meaning of the words. The statute, as I have often said, deals with business matters, and we must give a business meaning to it. In my opinion the meaning is, that a man in business must keep his

books properly, but if his business is one in which it is not usual to keep any books, or if the man is not engaged in business, then he need not keep any books at all. If it means that a business man is to keep business books, it cannot mean that a man of business is to put down all his private concerns in his business books, where they would be out of place, and, if he is not to enter them in his business books, he is not bound to keep any other books. In my opinion the Divisional Court and the county court judge were right in their construction of this section.

FRY, L.J. The bankrupt in the present case carried on the business of a hatter. He had also other transactions of a kind which, in my judgment, are aptly and properly described as "business" transactions. He entered into them not for pleasure, but with a view to profit, and, according to the ordinary meaning of the word "business," they are properly described as "business" transactions. These transactions were purchases and sales of and dealings with houses and land with a view to profit. He invested money in the transactions, and consequently had that which is spoken of in the Act as a "financial position." The language of s. 28 is this: "That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him;" that is one thing, "and as" (introducing a new subject-matter) "sufficiently disclose his business transactions and financial position." It is obvious that to require a man to keep "usual and proper," and, if you will, exact and detailed, accounts in respect of his business of a hatter, while he keeps no accounts at all with respect to much larger transactions carried on by him—keeps no accounts shewing his "financial position"—is to require him to keep accounts which would really be almost immaterial. You would be dealing anxiously with the small matters, and leaving out the much weightier matters. I cannot help feeling, therefore, that the language of s. 28, applying to a man who carries on a trade and has other business transactions, does require that he should keep, if necessary, two kind of books, first, such books "as are usual and proper in the business carried on by him;" and, secondly,

1887

EX PARTE BOARD OF TRADE. IN RE MUTTON.

FRY, L.J.

such books "as sufficiently disclose his business transactions and financial position." That appears to me to be the grammatical meaning of the words. The second "as" would obviously be unnecessary, if the words "sufficiently disclose his business transactions," &c., referred to the same books as are referred to before. Moreover, the words are "his business transactions," not "his transactions in his said business," which would be the natural thing to have said, if it had been intended to confine the books to the particular business carried on by the bankrupt.

But it is said that if the words are to be applied, as I have applied them, to a man who is carrying on a trade they will equally apply to a man who is carrying on no trade at all, but who has a private "business transaction" and a "financial position," and that so to construe the section would bring about "a revolution in the social life in England." I am not sure that that is not rather an exaggerated than an exact description of the effect of that construction, because a great many persons who are not engaged in trade do keep banking accounts, and a banker's pass-book would often be sufficient to disclose a man's business transactions and his financial position. Such a thing is common in this country. But it is not material to pursue that inquiry, because this is a new statute. It has extended to non-traders provisions which were before confined to traders, and I cannot think that it would be right to read language which applies to all persons, whether they are traders or not, as if it applied exclusively to traders. Again, a comparison of the previous legislation with the present Act seems to me to lead to the same conclusion. By the Bankruptcy Act of 1861 traders only were required to keep books. Now that obligation is extended to all bankrupts, traders and non-traders. This is the conclusion to which I feel myself forced to come by the language of the statute, though I cannot but entertain the greatest doubt as to accuracy of it when I differ, not only from the judges of the Divisional Court, but from my learned brethren on this bench. If opinions were merely numbered it would be four to one against the chance of my judgment being right; if they were weighed, it is not for me to suggest how much those odds would be increased. I have, however, felt bound to state my opinion.

LOPES, L.J. I agree in the construction which has been put on this section by the Master of the Rolls, and I am unable to agree with Fry, L.J.

The bankrupt was a hatter. He kept books with regard to his business as a hatter, and no fault can be found with the way in which he kept them. Having some landed property of his own, which he had inherited, he bought some adjoining land and expended money in building speculations connected therewith. The question is, was he bound to keep books in respect of those transactions? I think he was not. If the construction suggested by Fry, L.J., was adopted, the logical result would be that a private gentleman who carries on no business whatever would be bound to keep books.

It is said that as a rule private gentlemen do keep books, because they have their bankers' books. If that be so, a man's discharge might be refused because his banker did not keep books. I cannot think that was the intention of the legislature. It would introduce such a change as could never have been contemplated.

I am at a loss to understand what "business" it can be said that the bankrupt carried on with regard to these houses, or what would be the "usual and proper books," even if it could be said to be a "business." In my opinion the expression "financial position" does not mean the man's "financial position" aliunde, but his "financial position" with regard to the business which is carried on by him. The decisions of the county court judge and the Divisional Court were right, and this appeal must be dismissed.

Solicitor for appellants: *W. Murton, Solicitor to Board of Trade.*

W. L. C.

1887
May 27.

[IN THE COURT OF APPEAL.]

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION, LIMITED *v.* NEVILL.

Marine Insurance, Mutual Association for—Action for Contributions—Principal and Agent—Undisclosed Principal not Member of Association.

T., the manager and part owner of a ship, became a member of a mutual insurance association, and took out a policy with such association in respect of the ship.

The articles of association gave power to the committee, in order to provide funds for the business of the association, from time to time to direct sums to be paid by the members rateably. By the policy, which was made by the association under their seal, the association agreed with T. that the members thereof should according to the articles of association pay and make good losses and damages to the ship occasioned by the risks insured against, subject to a proviso that the association should be liable only to the extent of so much of the funds as they were able to recover from the members liable for the same and which were applicable for the purpose of paying claims under the policy. Certain contributions to the funds of the association having, in accordance with the articles, become payable by T. in respect of the ship, and T. being bankrupt, the association sued N., another part owner of the ship, for such contributions as an undisclosed principal of T. :—

Held, that, the effect of the articles of association and the policy being that the liability for such contributions was imposed on members only, and N. not being a member of the association, he could not be sued for such contributions as an undisclosed principal of T.

Appeal from the judgment of Grove, J., at the trial.

The action was for calls or contributions alleged to be due from the defendant to the plaintiffs in respect of the insurance of the steamship *Marquis Scicluna* in accordance with the rules and regulations of the plaintiffs' association: and also upon a guarantee or undertaking alleged to have been given by one Ormond on behalf of the defendant, whereby he agreed in consideration of certain policies of insurance, among which was a policy upon the said steamer, to pay all calls.

At the trial the facts, so far as material to this report, appeared to be as follows:—

The plaintiffs were an association limited by guarantee for the purposes of mutual marine insurance. One Tully was part owner and manager of certain steamers, of which the *Marquis Scicluna* was one. He became a member of the plaintiffs' association in

respect, among other steamers, of the said steamer *Marquis Scicluna*, of which the defendant was also a part owner, and he took out a policy on the ship under the rules of such association.

The plaintiffs' memorandum of association stated that the association was established for the "mutual insurance by the association of the ships of members and of ships which the members may be authorized to insure in their own names and of ships in which they may be otherwise interested, and of the freights of such ships, and of the individual members themselves, against any liabilities that may be incurred by them personally as owners or otherwise in respect of such ships and of all other interests or matters usually or properly covered by or included in insurances with respect to shipping and to interests therein or liabilities in respect thereof."

The 4th article of association provided that "every person, who, on behalf of himself or any other person or persons, insures or enters for protection any ship or ships, or share or shares of a ship in the association, shall as from the date of the commencement of such insurance or protection be deemed to have become a member of the association." The articles provided for the division of the association into three different classes or clubs, viz., the steamship club, the freight club, and the protecting club, and the 39th article provided that all policies of insurance underwritten on behalf of any of the said classes should be underwritten in the name of the association, but no person should in respect of any insurance or protection in any of the classes be liable to pay or entitled to receive any money in respect of any insurance or protection in any other of the classes. The 41st article provided that "all claims in respect of insurance or protection shall be made and enforced against the association only and not against any members thereof; but the association shall not be liable to any member or other person for the amount of any loss, claim, or demand, except to the extent of the funds which the association is able to recover from the members or persons liable for the same and which are applicable to that purpose." The 44th article provided that, "for the purpose of providing funds for making any payment necessary or proper to be made by or on behalf of the association for expenses connected with the business

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

thereof or otherwise, it shall be lawful for the committee from time to time to direct that there shall be paid to the association by the members thereof rateably for the purpose of providing for or making good any such payments such sums as the committee may from time to time deem necessary." The 45th and 46th articles provided for "calculating the rate of contribution to be paid by the members for their respective proportion of any loss, claim, or demand or expenses," that payment might be enforced in the name of the association, and that "in the event of any sums for the time being payable by any member of the association or of the classes or clubs not being duly paid," the amount of such deficiency should be borne and made good rateably by the other members of the association or of the classes as the case might be. There were separate codes of rules applicable respectively to each of the classes, and such rules in the case of each class provided that "the members for the time being of this class shall form one separate class or club within the association," and that "the members shall severally and respectively not jointly or in partnership insure" the ships entered or the freight of ships entered as the case might be.

The policy made in respect of the ship *Marquis Scicluna*, which was under the seal of the association, after reciting that Tully had become a member of the association, and had entered the ship for insurance in class 1, witnessed that, in consideration of the premises and of the observance by the said insured of the rules and regulations of the said class, the association did agree with the said insured that the members of the said association having ships entered in the said class should, according to the provisions of the articles of association of the said association and the rules of the said class, which were indorsed on the policy, and subject to the proviso thereinafter contained, be subject and liable to pay and make good and should pay and make good all such losses and damages as thereinafter expressed which might happen to the said steamship; "provided always that, in accordance with the articles of association and the rules of the said class, this policy and the other policies of the association are granted on this condition, and it is hereby specially agreed that the association, under all their policies of insurance of the said class, shall be

liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class and their respective heirs, executors, and administrators liable for the same, and which under and by virtue of the rules of the said class are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class." The 31st rule indorsed on the policy provided that "a member shall be uninsured in respect of any ship or his share therein (*a*) from the date of the legal transfer of such ship; (*b*) if he do not pay when due and demanded any amount payable by him; (*c*) if his ship or shares therein be mortgaged or assigned at or after entry, unless, before a claim accrues, an approved undertaking registered by the managers has been given to pay all contributions due and to become due; (*d*) if he becomes bankrupt or insolvent, unless, before a claim accrues, an approved undertaking registered by the managers has been given to pay all contributions due and to become due; (*e*) if any person giving an undertaking under this rule fail to discharge his liability, unless and until a fresh undertaking be tendered and accepted."

Certain contributions had become payable by Tully under article 44, by reason of his membership of the association in respect of the said steamship *Marquis Scicluna*, but, he having become bankrupt, were not paid. The plaintiffs sought in the action to render the defendant liable in respect of such contributions as an undisclosed principal of Tully in the contract of insurance between him and the association.

With regard to the alleged guarantee or undertaking signed by Ormond the jury found on the evidence adduced that he had no authority from defendant to sign it, and that the defendant had not ratified the same. The facts with relation to such undertaking are not material to this report. The learned judge held that the defendant, not being a member of the association, was subject to no liability under the articles of the association or the contract of insurance. He therefore gave judgment for the defendant. Against this judgment the plaintiffs appealed.

April 26. *Bigham, Q.C.*, and *J. Fox*, for the plaintiffs. This is not, as supposed by the learned judge below, like the case of

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

an endeavour to make a cestui que trust of shares liable for calls. It is substantially an action for premiums of insurance against the undisclosed principal of a person effecting an insurance on a ship, premiums in the case of mutual insurance being the contributions to the losses of other members. The defendant became an assured and as such liable to pay premiums. The term "members" in the policy and articles of association would include undisclosed principals of persons effecting the insurance. Tully in effecting the insurance was acting in a double capacity. He becomes thereby a member of the association, and subject to its rules; but he also acts as agent for his undisclosed principal to effect a contract, and the principal is liable on the contract so effected.

[They cited *Lion Insurance Association* v. *Tucker*. (1)]

Finlay, Q.C., and *R. W. Harper*, for the defendant. The whole scheme of the association for mutual insurance as laid down in the memorandum and articles of association can only be carried out by treating it as an association for mutual insurance as between members only, and the sole contract as being between the member of the association who effects the policy and the association which grants it. The terms of the articles and of the policy are quite incompatible with the notion that there can be an undisclosed principal liable on the contract or as a member of the association. The defendant cannot be liable on any contract so far as the policy taken by itself is concerned, for the policy is only executed by the association, not by the defendant or his agent. The articles only impose liability on members of the association, viz. the persons insuring ships with the association to whom the policies are granted.

J. Fox, in reply. (2)

Cur. adv. vult.

May 27. The following judgments were delivered:—

LORD ESHER, M.R. The action is brought against the defendant the part owner of a ship, as the undisclosed principal of Tully,

(1) 12 Q. B. D. 176.

(2) The provisions of the articles and policy were fully and minutely discussed during the argument, but it appears unnecessary to give the details of such discussion as such provisions are fully dealt with by the judgments.

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

Lord Esher, M.R.

the ship's manager, who had taken out a policy on the ship in his own name and had become thereby a member of the plaintiffs' association according to its rules. The question therefore arises whether the plaintiffs can sue the defendant as Tully's principal.

There is much complication and difficulty in connection with these mutual insurance associations. In the case of *Lion Mutual Insurance Association* v. *Tucker* (1) I endeavoured to explain the business relation of the members of such an association to each other. It is necessary to consider the form in which the parties have carried out those business relations in order to ascertain what remedies are available for the purpose of enforcing them. The first question which it may be material to consider is, whether the different members of the association have any remedies or rights of action, and if so what, as between themselves. It is obvious, as explained in the case I have referred to, that members cannot sue other members in respect of payments due from the other members as such to the association. Only the association can sue in respect of such payments.

Then can members sue other members in respect of claims arising out of the insurance of ships? In the case of *Lion Insurance Association* v. *Tucker* (1) I stated that the business relation between the members was that they were in reality both insurers and insured; but that business relation is carried out by means of a policy given under the seal of the association. The members of each class are insurers and insured as between themselves and the other members of the class; they are insured not by the whole association but by a part only of the association, viz., the members of the same class. A member who has suffered a loss must however sue on the policy given by the association. But that policy is made by the association. In order to sue the other members of the class, who are really his insurers, he would have to say that they were the principals of the association in giving him a policy under the seal of the association. I do not think he could do so. I think that, in the case of such a contract as this under seal, it is not allowable to go behind the instrument to make undisclosed principals responsible, because

(1) 12 Q. B. D. 176.

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

Lord Esher, M.R.

they are not parties and have not attached their seals to the contract under seal. Moreover, it is to be observed that in this case the contract is that he is to be paid in respect of the loss he has suffered only the amount which the association can collect from the other members of the class. There would be this difficulty in suing the other members, viz., that they might have satisfied their liability by payment of their contributions to the association; and the member is not to receive the payment direct from them, but is to receive the amount collected by the association. There is no contract, as it seems to me, between the member who has suffered the loss and the other members but only between him and the association; and such member, therefore, cannot sue the other members, although they are really his insurers. If the member could not sue, a person could not sue as his undisclosed principal. Then as regards any action against a person alleged to be the undisclosed principal of a member by the other members, it would be impossible to allege that a person is an undisclosed principal in respect of the contract, unless the parties who allege that he is a party to the contract as an undisclosed principal could be sued by him as well as he by them. It seems to me clear, therefore, that the members have no right of action as between themselves.

Then in respect of what can the association sue or be sued by its members? A member can sue the association for a loss on his ship. That is expressly provided by the policy. In respect of what can a member be sued by the association? He cannot be sued as an insurer, though he is in business reality an insurer, by reason of the form in which the relation between the members is carried out. The association are in form the insurers and make the policies. They therefore cannot sue him as an insurer. They can only sue the members in respect of what is really the premium. Here no premium properly so called is paid, but each member is liable to a contribution towards losses which may be suffered by the other members on their policies. Therefore the association can only sue the member as an assured for what is equivalent to the premium. It seems to follow that, if they cannot sue him as an insurer, neither can they sue the person alleged to be his undisclosed principal as an insurer. If such

person can be sued at all, it must be as an assured for what is equivalent to the premium. But can he be so sued? Such an association as this can only enter into binding policies with members. When the policy is entered into, the person with whom it is so entered into becomes a member. If a person could be an undisclosed principal with regard to such a policy, it would really make him an undisclosed member. If he is not a member, the policy cannot be made with him so as to be binding. I do not think there can be such an undisclosed member or partner so far as the other members are concerned. If it were so, then the making of such a policy as this would make the alleged undisclosed principal of the person effecting it an associate with the members of the association without their knowledge and consent. I do not think this can be so. I do not think that a person actually interested in a ship who has authorized another person to enter into a policy in his own name with the association is a party to the contract as an undisclosed principal, because, to make him so, it would be necessary to say that he is a member of the association to which he is wholly undisclosed and unknown. I do not think that he is a party to the contract as an undisclosed principal, although he may be a cestui que trust in respect of the proceeds the member may receive. Not being a party he cannot sue or be sued on the contract. For these reasons, I do not think this action will lie against the defendant as an undisclosed principal.

FRY, L.J. In this case the plaintiffs are a company limited by guarantee formed for the purposes of mutual assurance. One Charles Tully became a member of this society in respect of a steam vessel, the *Marquis Scicluna*, of which the defendant was a part owner, and Tully also took out a policy on the ship.

Tully has become bankrupt, and the association sues the defendant as an undisclosed principal in the contract of assurance; and the question in the case, as it presents itself to my mind, is whether by reason of the nature of the contract in this case the ordinary right of a contracting party to sue the undisclosed principal of the other party has or has not been repelled.

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

FRY, L.J.

Other questions were raised in the course of the discussion. It was argued that Tully was not authorized by the defendant to insure the ship in question in an association like the plaintiffs'; but looking at the circular on the faith of which the defendant took shares in the ship in question, and at the prevalence of insurance in mutual clubs, especially in the northern ports, I am of opinion that the defendant cannot successfully deny the authority of Tully to enter this ship in the plaintiffs' association. Another question was raised as to whether a certain Mr. Ormond signed an undertaking to the plaintiffs with the authority or the subsequent ratification of the defendant. But this question was left to the jury, on which they found for the defendant. I see no sufficient reason to disturb their finding.

The main question in the cause, therefore, appears to me to turn on the nature of the contract between Tully and the plaintiffs' association. This contract is to be found in three instruments, namely, the memorandum of association, the articles of association, and the policy of assurance issued by the plaintiffs to Tully in respect of the ship in question.

The memorandum and articles of association of course constitute an agreement inter socios, and inter socios only, and they cannot of themselves give rights, or create obligations to or in any one except the members of the association, or those, who like legal personal representatives or trustees in bankruptcy, take their rights and assume their burthens. The memorandum and articles of association when examined appear to me to correspond with what might be expected from their general character and object.

The 4th article makes every person who, on behalf of himself or any other person, insures or enters for protection any ship, or share of a ship, in the association, a member during the period of the insurance.

The 44th article defines the manner in which funds are to be raised for making any payment necessary or proper to be made by the association for expenses connected with the business thereof or otherwise (words which, I conceive, include all claims on policies), and it gives the committee the power to direct that contributions shall be paid to the association by the members

thereof rateably. The 45th and 46th articles throughout treat the contributions as payments by members. It is true that in article 41 the expressions "or other person" and "or other persons," follow the words "member or members"; but these words are, I think, used as equivalent to executors, administrators, or assigns.

It appears to me clear beyond argument that on the mere memorandum and articles of association the defendant could not be affected with liability. The object of such instruments is to regulate the rights of members: and decisions have long since shewn that the fact that a share is held by a member in trust for a third person, neither exonerates the member from liability nor creates any liability in the cestui que trust to the company.

The statute which avoids all contracts of assurance not embodied in a policy of assurance made it impossible for the whole of the relations between a member and the association (though those relations were strictly mutual) to be embodied in the memorandum and articles of association, and made it necessary for the society to issue a policy in respect of every ship insured by a member; and this policy of assurance I now proceed to consider.

The policy, which is under the common seal of the association, recites that Tully, having become a member of the association, and having entered for insurance in class No. 1 the steamship in question, had become entitled to the policy. The considerations stated are the premises, i.e., the membership of Tully, and the observance by the insured of the rules and regulations of the class. Now, what was that consideration? It was that Tully would pay his contributions towards claims against the association under article 44; a consideration which extends to Tully and his representatives, but does not move from Nevill as an undisclosed principal or as a cestui que trust of Tully. Again, if the defendant is to be liable at all for the default of Tully to pay his contributions as a member of the company, I incline to hold that he must be liable on a guarantee to answer the default of Tully. But there is in the present case no guarantee signed by the defendant which would satisfy the Statute of Frauds. The obligation undertaken by the association with Tully according to

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

Fry, L.J.

the policy is this, that the members of the association having ships entered in the said class shall, according to the provisions of the articles of association and the rules of the said class, and subject to the proviso thereinafter contained, pay and make good the losses insured against; here, again, we have the policy referring to the articles of association as the measure of liability, and, so far as mere expression goes, we therefore find a liability recognised as limited to members.

The proviso incorporated in the operative part of the policy is in these words: "Provided always that in accordance with the articles of association of the said association and the rules of the said class, this policy and the other policies of the association and class are granted on this condition, and it is hereby specially agreed that the association under all their policies of insurance of the said class shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class and their respective heirs, executors, and administrators liable for the same, and which under and by virtue of the articles of association and of the rules of the said class are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class." Now here we have again words of reference to the articles of association as if they were the measure of liability; but, furthermore, we have words declaring that the association shall be liable only to the extent of so much of the funds as the association is able to recover from the members of the said class, and their respective heirs, executors, and administrators liable for the same. It was argued that these words are intended only to preclude liability of members of one class for losses in another, and all liability in respect of sums payable by members, but which the society could not recover by reason of the insolvency of the members or otherwise. But the words taken in their natural signification negative all liability except that stated. So taken the words appear to me to exclude liability for sums payable, but not capable of recovery, for sums payable by any one except a member, and for sums payable by members of any class except the class insured in. I can see no reason for not giving to the words of the proviso their full significance.

The rules relative to class 1 are indorsed on the policy, and are by reference incorporated in it. They throughout refer to the liabilities and rights as those of members. But what is perhaps more important is that the 31st rule provides that a member shall be uninsured in respect of any ship, or his share therein, in various contingencies, amongst others, if his ship or share be mortgaged or assigned at or after entry, or he becomes bankrupt, or unless in each of these cases before a claim accrues an approved undertaking registered by the managers has been given to pay all contributions due or to become due. Now the very object of this rule appears to me to be to enable the managers in the case of an undisclosed principal to drive that person into a direct obligation to the company, an obligation which would be needless if the general rule of law applied to this policy.

The conclusion to which this examination of the documents brings me is this: that the primary object of the members of the association was mutual assurance, i.e., an assurance of the property of or represented by the members with the members and with no one else; that the memorandum and articles of association carry this intention into effect; that the policy was needful under the statute to give effect to this mutual assurance, but was not intended to create any liability beyond that of the members; but that on the contrary the tenor of the policy and rules shew an intention to confine the liability on the policy to the liability under the articles; and that the proviso in express language excludes any liability of the association for moneys recovered from anyone but members, which would be absurd and insensible if they had the right to sue persons who were not members but undisclosed principals. I therefore conclude that the ordinary principle of law which makes such principals liable was negatived and that this appeal fails.

LOPES, L.J. I have come to the conclusion that the defendant cannot be sued in this action on short and simple grounds.

The plaintiffs sue the defendant for contributions as an undisclosed principal, and also on a guarantee alleged to have been given with the authority or subsequent ratification of the defendant.

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

Lopes, L.J.

On the guarantee the jury found against the plaintiffs, and I can see no reason why the verdict should be set aside.

The material question is whether the ordinary rule of law by which an undisclosed principal can be sued by a contracting party applies in the special circumstances of this case.

This depends on the construction of the memorandum and articles of association and the policy issued to Tully. If there is nothing in these documents, which contain the contract, negativing its application, then the ordinary rule of law attaches, and the plaintiffs can sue the defendant as an undisclosed principal, and recover the contributions owing to them.

The defendant in answer to this portion of the plaintiffs' case says that he was not a member of the association, and not being a member he was not responsible for the contributions sued for, that by virtue of the rules of the plaintiffs' association and the contract made between Tully and the plaintiffs' association the plaintiffs can only look to Tully for the contributions now owing.

The facts have been stated. I need not again refer to them. The memorandum and articles of association contemplate and provide for *no* rights and liabilities outside those of the members, and those upon whom the law in case of death or bankruptcy casts responsibility. Membership and mutuality are the essence and vitality of the concern. The defendant is not a member, and cannot be affected with liability by anything in the memorandum and articles of association, which concern members only. But is there anything in the policy creating a liability in the defendant to be sued as undisclosed principal? I can find nothing extending the liability beyond the liability of members contemplated by the memorandum and articles of association. The proviso in the policy clearly points to the same liability as that created by the memorandum and articles of association, and the 31st rule would be unnecessary if an undisclosed principal could be sued. I believe the main reason why the 31st rule was incorporated into the policy was because the undisclosed principal could not be sued, and because, except for the rule, in the circumstances contemplated by the rule, there would be nobody who would be liable to the company.

1887

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION v. NEVILL.

I am of opinion that the contract contained in the memorandum and articles of association and policy negatives the ordinary rule of law, and that the defendant is not liable.

Appeal dismissed.

Solicitors for plaintiffs: *Parker, Garrett, & Parker.*

Solicitors for defendants: *Flux & Leadbitter, for W. B. Pilkington.*

E. L.

[IN THE COURT OF APPEAL.]

May 21.

HENDERSON BROTHERS *v.* THE MERSEY DOCKS AND HARBOUR BOARD.

Ship—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 230—*Dock Tonnage Rates—Vessel "trading inwards"—Arrival and Departure constituting one Voyage.*

The Mersey Dock Acts Consolidation Act, 1858, 21 & 22 Vict. c. xcii., s. 230, provides as follows: "All vessels entering into or leaving the docks shall be liable, according to the tonnage burthen thereof, to pay to the board the rates hereinafter called dock tonnage rates mentioned in Schedule B. to this Act annexed, according to the several and respective classes of voyages described in such schedule: that is to say, to or from the port of Liverpool from or to any parts or places in such schedule mentioned, and such rates shall be paid to the board by the masters or owners of such vessels, and shall be charged as follows: vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool: vessels arriving in ballast but trading outwards, and also vessels built within the port of Liverpool or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards; and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates: vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart: one arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards or arrived or departed in ballast, and without regard to any intermediate ports between which she may have traded whilst absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded: vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards and having paid the rates payable on such trading outwards shall afterwards on trading inwards be liable to the rates payable on vessels trading inwards."

The plaintiffs were the owners of steamships, the practice with regard to

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

their voyages being as follows: they sailed from Glasgow to Liverpool partly laden, entered the Liverpool Docks and there completed their lading, discharging no cargo: they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed for Liverpool, entered the docks there, and discharged cargo, and then returned with the remainder of their cargo or in ballast to Glasgow:—

Held, by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting, that the defendants, the Mersey Docks Board, were entitled under the above-mentioned section to charge in respect of the plaintiffs' vessels using the defendants' docks as aforesaid on their way to India dock tonnage rates as upon vessels trading inwards from Glasgow, and on such vessels using the docks as aforesaid on their return voyage from India rates as on vessels trading inwards from India.

By Lord Esher, M.R. The defendants were entitled to charge on the plaintiffs' vessels using the docks as aforesaid on their way to India dock tonnage rates as on vessels trading outwards to India, and on such vessels using the docks on their return voyage from India as aforesaid rates as on vessels trading inwards from India.

APPEAL from the judgment of Mathew, J., at the trial.

Statement of claim was as follows:—

1. The plaintiffs are owners of vessels which trade between Liverpool and Glasgow and foreign ports.

2. It has been for many years and still is usual for the plaintiffs' vessels trading as aforesaid to commence their loading at Glasgow, and with the cargo so loaded to proceed to Liverpool, there complete their loading, and, without discharging any cargo at Liverpool, to proceed to a foreign port, such vessels afterwards returning to Liverpool with cargo, and, after discharging cargo at Liverpool, proceeding to Glasgow with the remaining cargo or in ballast.

3. The defendants as the harbour authority for the port of Liverpool have demanded as dues under the Mersey Dock Acts in respect of round voyages as in the last paragraph described and have compelled the plaintiffs to pay the following dock tonnage rates, that is to say: (1) Upon the voyage from Glasgow to Liverpool and from Liverpool outwards the rate payable in respect of the most distant of the ports to which the vessel traded outwards; and (2) upon the homeward voyage from the foreign port or ports to Liverpool and thence to Glasgow the rate payable in respect of the most distant port from which the vessel had traded to Liverpool.

The statement of claim then proceeded to allege that the rates

so charged were excessive and illegal, and claimed a return of amounts paid by the plaintiffs in excess of the legal rates in the past of which particulars were given, and a declaration that for the future such rates were excessive.

Statement of defence in substance stated that the defendants were public trustees incorporated by the Mersey Docks and Harbour Act, 1857 (20 & 21 Vict. c. clxii.), and under that Act, and various other Acts, were entitled to receive certain rates and dues. It then set forth s. 230 of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.) (1), and, after stating the circumstances under which dock tonnage rates had been received by the defendants from the plaintiffs, claimed to have been

(1) That section provides as follows: "All vessels entering into or leaving the docks shall be liable, according to the tonnage burthen thereof, to pay to the Board the rates hereinafter called Dock Tonnage Rates, mentioned in the Schedule B to this Act annexed, according to the several and respective classes of voyages described in such schedule—that is to say, to or from the port of Liverpool from or to any parts or places in such schedule mentioned, and such rates shall be paid to the Board by the masters or owners of such vessels, and shall be charged as follows:—

"Vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool:

"Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards, shall be liable to one moiety only of such rates, but shall thereafter pay full rates:

"Vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart.

"One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast, and without regard to any intermediate ports between which she may have traded whilst absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded: vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards, on trading inwards, be liable to the rates payable on vessels trading inwards."

The rates were specified in a table of rates which varied according to the distance of the place to or from which the vessel traded. Vessels trading coastwise between Liverpool and Scotland were charged at the rate of 4½*d.* per ton, whereas vessels trading between India and Liverpool were charged at the rate of 1*s.* 5*d.* per ton.

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

entitled to receive them by virtue of the before-mentioned section.

The facts at the trial before Mathew, J., in London, appeared to be in substance as follows. The plaintiffs were shipowners carrying on business at Glasgow, and were the proprietors of a large number of steamers. The practice with regard to the voyages of their ships was that they took in a portion of their cargo at Glasgow; proceeded thence to Liverpool, where they entered the docks and completed their loading, but discharged no cargo; and thence proceeded to some foreign port, generally in India, where they discharged. They then loaded a full cargo in the foreign port for the United Kingdom; and sometimes came back to Liverpool, and, having discharged cargo in the docks there, proceeded with the rest of their cargo or in ballast to Glasgow, or sometimes came back to Glasgow direct. The defendants had charged and claimed to charge the dock tonnage rates as on vessels trading outwards to the foreign port in respect of the plaintiffs' ships using the docks at Liverpool as before-mentioned on their way to the foreign port, treating the arrival and departure as one voyage; and they had charged and claimed to charge the dock tonnage rates as on vessels trading inwards from the foreign port in respect of the plaintiffs' vessels using the docks at Liverpool as before-mentioned on their return to the United Kingdom, again treating the arrival and departure as one voyage. The plaintiffs' contention was that the 230th section above-mentioned imposed no dock dues in respect of the plaintiffs' ships using the Liverpool Docks as aforesaid on their way from Glasgow, because such vessels were not vessels trading inwards, nor vessels entering in ballast and trading outwards; and there was no provision in the section in respect of vessels entering the Liverpool Docks not in ballast but with cargo and trading outwards; or, alternatively, that, if such vessels were subject to dues under the section at all, they must be considered as trading inwards, and that the defendants were only entitled to charge rates as on a coasting voyage from Glasgow as distinguished from a foreign voyage, which would be by the Act $4\frac{1}{2}d.$ per ton, instead of 1*s.* 5*d.*; and that the arrival of the ship at Liverpool on her voyage from India, and her departure from Liverpool

again for India, constituted one voyage on which one set of dues was payable, viz., as on a vessel arriving from the foreign port and departing again. The learned judge held that the defendants were entitled to charge the dock tonnage rates as on a voyage coastwise in respect of the voyage between Liverpool and Glasgow and back, and the foreign dock tonnage rates in respect of the outward voyage to India and back. He therefore gave judgment for the plaintiffs, directing an account to be taken of the sums paid in excess of the amounts which ought to have been paid on that basis.

Against this decision the defendants appealed, and the plaintiffs gave notice of cross appeal.

Jan. 21–23. *Finlay*, Q.C., *French*, *Q.C.*, and *T. F. Squarey*, for the defendants.

Sir R. E. Webster, *A.G.*, *Cohen*, *Q.C.*, and *Joseph Walton*, for the plaintiffs.

The arguments sufficiently appear for the purposes of this report from the judgments.

Cur. adv. vult.

May 21. The following judgments were delivered.

LORD ESHER, M.R. The Liverpool Dock Acts are a long series of statutes dealing with a complicated and technical business, a business which has been developing enormously from period to period. The statutes are therefore necessarily complicated, probably wanting in consistency, and therefore obscure, certainly full of terms and phrases usual in the business, unusual in ordinary colloquial language. The great canon of construction of such documents is to learn the business, and the language of the business with regard to which they are written, and then to construe the documents by applying them to that business and to that language. The business in the present case is that of a great seaport and harbour, with docks, the whole adapted, constructed, and managed for the importation and exportation of goods by sea. In order to carry on such a business the principal elements are deep channels, beacons, buoys, lights, quays, dock entrances, docks, and warehouses. The staff of persons employed must be various, including pilots, harbour-masters, dock-masters,

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Lord Esher, M.R.

labourers, police, clerks, &c. The income necessary to maintain so vast a business must be collected from those who use the harbour and docks. They are used by ships which come to and use them for the purpose of carrying goods. In such a seaport both ship and goods must be subject to the Customs. The terms and phrases used in statutes and documents applied to such a business will therefore be those commonly used by merchants and shipowners in regard to ships and to the import and export of goods, and by revenue officers with regard to the business of the Customs relating to ships and goods. The income in such cases is collected by a system of rates, and the chief rates are almost necessarily, from the nature of things, harbour rates, light dues, pilotage dues, dock rates, crane and quay rates. The "harbour rates," and "light and pilotage dues" are applicable to ships coming into and going out of the port or harbour; they are payments for facilities given to the ships, which facilities are equally necessary for the ships, whether they are loaded or unloaded, whether they do or do not enter the docks. The "dock rates" are the payments for the use of the docks, as distinguished from the rest of the port or harbour. The docks give facilities to trading ships with regard to their trade, which is the trade of carrying imported and exported goods, and to the goods with regard to the trade of importing and exporting them as articles of commerce.

This case deals more with the docks and the dock rates than with the harbour and the harbour rates. It is right therefore to consider with the greater attention the course of business as to the docks. There is considerable skill and labour in moving a ship in a dock to or from the dock gates; but no one who has not seen it can realize the skill and labour exercised by the servants of the Dock Board in the conduct and superintendence of the entry or exit of a large ship through the gates of a Liverpool dock from or into the fierce tideway of the Mersey. So far as the ship is concerned the chief anxiety and labour with regard to the use by her of the docks is the anxiety and labour of her entry and exit. The use of the docks for the goods imported and exported is a use of warehouses, quays, cranes, and the labour of putting the goods into or taking them out of the ship. There is,

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Lord Esher, M.R.

of course, a payment, as of rent, for the time during which ship and goods are in the dock; and there is an immense expense incurred in providing for the safety of ships and goods whilst in the docks. It is obvious that the mode of imposing payment for the various services and facilities thus described required ingenuity; and it was certain to be, and it is the case, that, in order to understand correctly the scheme or schemes of those who have imposed the different rates, one must understand the business with which they were dealing. The light and pilotage dues and other harbour dues payable for ships are easily understood. They are payable in respect of the use of the entrances to the Mersey and of the use of the Mersey. They are therefore obviously payable equally by ships which do and ships which do not enter the docks. The dock rates are necessarily extra to these, and are, moreover, the higher rates. It is clear therefore that no ships will enter a dock unless for repairs or for carrying on its trade, namely the trade of carrying goods to or from the port of Liverpool. The scheme of payment for the use of the docks by the ship and by the goods, a scheme of payment according to the distance of a port to or from which a ship trades from or to Liverpool is based, no doubt, upon good business principles; but it is not easy, and it is unnecessary, to explain the grounds of it. Inasmuch as the dock is, as matter of fact, used only by a ship carrying on its trade (except in the case of repairs), the payment for the ship would be sure to be confined to a trading ship. The trading of a ship consists in her business of carrying goods. The goods which she is thus carrying as part of her trade are, at Liverpool, goods which she carries to or from Liverpool as a terminus of carriage. The business phrases for the business of the ship in carrying goods to or from such an import and export port as Liverpool are, in Customs phraseology, "vessels clearing inwards or outwards," in mercantile or business phraseology "vessels trading inwards or outwards." They are corresponding phrases used to describe the same transaction. Ships which do not carry goods into Liverpool to be there delivered are not by the Customs "cleared inwards" to Liverpool, or in business said to be ships "trading inwards" to Liverpool. No business man would, in my opinion, think of saying that a ship which came

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Lord Esher, M.R.

into Liverpool with a declared intention of not delivering any goods there, and which delivered no goods there, was a ship "trading inwards." They are in Customs and business phraseology said to be ships "entering into Liverpool." Ships which do not carry goods by taking them in at Liverpool to be carried elsewhere are not by the Customs "cleared outwards" from Liverpool or in business said to be ships "trading outwards" from Liverpool. They are in Customs and business phraseology said to be "ships sailing" or "outward bound." The "clearing inwards" is the authority from the Customs to "trade inwards;" the "clearance outwards" is the authority of the Customs to "trade outwards." So far as the use of the Liverpool docks is concerned, the trading of the ships means taking goods on board in a dock to be carried elsewhere, or bringing goods into a dock to be delivered to the consignees from that dock. Either of these transactions may happen under different circumstances. First, a ship may come into the dock empty in order to take goods on board and leave the dock loaded; or, secondly, she may come into the dock loaded in order to discharge her goods there and to leave the dock empty; or, thirdly, she may come into the dock loaded in order to discharge her goods there, and then to load another cargo and leave the dock loaded. There was, I will venture to say, no other state of circumstances (unless she was to come or stay in for repairs) in which, as matter of business and fact, it was, when the original Liverpool Dock Acts were passed, contemplated that a ship would be in a Liverpool dock. The exceptional mode of dealing adopted by the plaintiffs must have arisen at a later period.

The statutes should be first construed according to the usual business which existed when they were enacted; then it will be necessary to determine how they apply to the exceptional and more novel case. The main point is to see whether the statutes have adopted, as to old existing business, the business phraseology. If they have, we must apply that phraseology to the case under discussion. Having read all the statutes brought before us, it appears that all of them deal with the different rates in, as nearly as possible, the same terms. Attention and examination may therefore be confined to the statute 21 & 22 Vict. c. xcii. passed in

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Lord Esher, M.R.

1858. The title divides the subject, as I have stated that business must divide it, namely, into a dealing with the docks and a dealing with the port and harbour. The rates are in the first part of the Act described to be dock rates, tonnage rates, graving dock rates, harbour rates, wharf rates, warehouse rents, town dues, anchorage dues. The fourth part deals with the management of the docks and quays, and with the absolute control given to the harbour masters and dock masters over the entry and exit of ships into and from the docks. The fifth part deals with the management of the port and harbour. The sixth part deals with the pilotage. The pilotage rates are dealt with in s. 133, and are imposed in respect of piloting "a vessel" "to the port" or "out of the port." No limitation of the vessel being a "trading ship." No mention of going into "dock." They are payable by every vessel "coming to" or "going out" of the port. The seventh part deals with transit sheds, warehouses, and goods. The eleventh part deals with rates and duties. This part divides "the tonnage rates," which is a general nomenclature, into "dock tonnage rates" and "harbour rates," following the business division. By s. 238 "all" vessels "coming into" or "going out" of "the port" of Liverpool, and *not entering the docks*, shall be liable, &c., to the tonnage rates, hereinafter called "harbour rates, &c." It must be observed that these are to be paid by *all* vessels, and they are said to be vessels "coming into" and "going out of" not trading into or trading out of the port. By s. 239 "The objects for which such 'harbour rates' shall be levied, &c., are: The maintenance of the lighthouses, light ships, buoys, beacons, sea-marks, landmarks, telegraphs, lifeboats, &c., and the improvement of the port and harbour in any other respect than in the construction and maintenance of the docks, &c." The division, the natural division, as matter of business, is exactly followed in the statute, and the statute imposes the incidence of payment exactly as business would. Bearing this in mind, we must endeavour to construe s. 230. In it vessels are described as first, vessels "trading inwards"; secondly, vessels arriving in ballast but "trading outwards"; thirdly the statement is "vessels built within the port of Liverpool or trading outwards." These, it is said, shall be liable to the rates payable in respect of the most

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Lord Esher, M.R.

distant of all the ports to which "they shall trade outwards." The section continues: "One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast, &c., but such vessel shall be liable to the rates payable in respect of the most distant of all ports to which such vessel shall have traded." The first of these divisions corresponds with the second of the business divisions above set forth; the second of these corresponds with the ordinary mode of conducting the first business division: the third division in the statute certainly corresponds with the third business division. The question is whether the third division in the statute does not also describe that which I have called the exceptional mode of conducting the first business division. It is urged that it does not, because it is said that, in order to make a grammatical conclusion to the phrase "and also vessels built within the port of Liverpool," you must read "and" instead of "or" as the following word, and that then the exceptional mode is not described. But let us dissect the sentence and it may be read thus: vessels arriving in ballast, but trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards: vessels built within the port of Liverpool shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards: vessels trading outwards shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards. If the section be so read, it covers all modes of trading outwards. If it is true to say that, in order to make good grammar, "or" must be read "and," it follows that the circumstances of the trade described as exceptional are not covered by the statute at all. In such a case the ship most clearly, in my opinion, does not "trade inwards"; she "enters into" the dock, but does not "trade inwards." If she is not within the description of a vessel "trading outwards," although in fact she does trade outwards, and uses the dock solely for the purpose of trading outwards, she will pay nothing in Liverpool at the time for the use of the docks. If she should not return to Liverpool, she would have used the Liverpool docks and would never pay anything for the use of the docks. I cannot

think that it is a real business view, and therefore I think it is not the legal interpretation to say that for the sake of grammar the word "or" should be changed into "and," so as thereby to produce so unbusiness-like a result. The Court cannot properly read one word for another used in a statute, unless it is clear beyond doubt that there is a mere error in the record of the word. If there is any reasonable doubt, the word actually used must remain. It seems to me that a ship which goes into a Liverpool dock solely for the purpose of taking goods on board to carry them away from Liverpool is a vessel "trading outwards" within the words of the statute, and must, under and by virtue of the statute, pay the rates as on a vessel "trading outwards," and is not a vessel "trading inwards."

Another part of the contention between the parties raised the question of the construction of the latter part of s. 230 as to one arrival and one departure to be considered as one voyage. Here, again, let us examine the business in order to see whether it will not teach us the true construction of the statute. If a ship goes into a dock to unload, does unload, and then loads a new cargo before she goes out, she is moved through the dock twice, comes into the gates once and goes out once. If a ship comes into the dock, and unloads, and goes out empty, and afterwards comes in empty, and loads, and goes out, she is moved through the dock four times, comes into the gates twice and goes out twice. One would expect that the payment in the first case would be less than in the second, considering the difference, before explained, of the skill, labour, and anxiety necessarily bestowed on the two operations. To which of these two cases does the enactment in the statute apply? As matter of business to the first, stipulating for one payment for the performance of one operation. It would seem to be bad business to stipulate for the same payment for the performance of two operations as is charged if one only of the two operations is performed. The words of the section are rather more adapted to the first view than to the second. The words are "one arrival *with* one departure"; they are not "one arrival *and* one departure"; not "one departure and one arrival." If the words are ambiguous the business view should prevail. It was suggested in answer to this reasoning and this

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Lord Esher, M.R.

view, that ships enter a dock and discharge in it, and are then moved to another dock and there load. If that is so, which is not proved, the removal is made by order of the dock board for its convenience, the removal giving no advantage to the ship, and the board has in the later Acts taken that burden without additional payment rather than alter the incidents of rating, which have been preserved intact through all the Acts. When the mode of rating was first established there were not many docks in Liverpool, and this suggested removal from one dock to another in all probability did not take place. I am of opinion that the statute deals with the first case in the limitation it confers, and not with the second.

In applying these views to the present case, we must notice the contentions raised between the parties. The contention on behalf of the plaintiffs, raised in the correspondence, was that their ships traded inwards into Liverpool from India, and afterwards traded outwards from Liverpool to India, and that these two voyages made one arrival and one departure to be considered as one voyage. It must be observed that, in order to make this point, the Glasgow ship was represented as commencing her carrying business in India to Glasgow, instead of as commencing in Glasgow to carry to India. The reason is obvious; without so doing the Indian trade would not commence by an arrival at Liverpool, but by a departure from Liverpool. And, in this contention, the voyages from Glasgow to Liverpool and from Liverpool to Glasgow were dropped out. The view of the learned judge, as I understand it, is that the entry into the docks from Glasgow is a trading inwards coastwise by the ship, and she must pay rates accordingly; that the ship then trades outwards to India and afterwards trades inwards from India, these two making one arrival and one departure, to be considered as one voyage; and that the voyage to Glasgow is also a part of the voyage from India. As to these views, I cannot agree that, as matter of fact, the ship trades inwards from Glasgow, or that she is to be considered as doing so within the meaning of the statute. Neither, for the reasons I have given, can I agree that the two Indian voyages are one arrival and one departure to be considered as one voyage within the meaning of the statute. I do agree

that the voyage from Liverpool to Glasgow, whether carrying cargo or not, is to be considered as one voyage with the voyage from India. I have read all the ship's papers furnished to us at our request. The ships are not "cleared out" from Glasgow to Liverpool, but from "Glasgow to India viâ Liverpool." The ships, on arrival at Liverpool from Glasgow, are not "cleared inwards." They are not treated as trading coastwise under a "transire" or under a "special coasting order." The captain's report shews that the Glasgow goods are exported to India and are not to be landed at Liverpool. The ships are at Liverpool "cleared outwards" for India. On their return they are "cleared inwards" from India. All this mode of dealing with the ships by the Customs seems to me to tend to the same conclusion. I am of opinion that the ship on arrival from Glasgow does not "trade inwards" to Liverpool. She cannot, therefore, in respect of that entry, when she goes into a dock, be liable to "dock dues." By her entry into the Mersey she has "entered into the port of Liverpool," and is liable to "harbour dues." When the ship enters into the docks and loads therein for India, she is "trading outwards to India," and must pay the dock dues on such a trading outwards. When she returns to Liverpool, and enters the docks to discharge, she is "trading inwards to Liverpool from India," and must pay the dock dues accordingly. This voyage cannot within the statute be considered as one with the voyage out to India. The voyage to Glasgow is to be considered as one with the voyage from India. I am, therefore, of opinion, that the charges imposed by the defendants were correct, and that the judgment should be entered for them. The appeal, in my opinion, should be allowed.

FRY, L.J., delivered the judgment of himself and Bowen, L.J.

The question in the present case turns entirely on the true construction of the 230th section of the Liverpool Dock Acts Consolidation Act, 1858, which imposes dock tonnage rates in the port of Liverpool. These rates, it may be at once observed, apply to all vessels entering into or leaving the docks, whilst the harbour rates apply to all vessels coming into or going out of the port and not entering into the docks.

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

Fry, L.J.

The plaintiffs are the owners of a line of steamers, and the course of business is that each of these vessels starts from Glasgow with a part of her cargo, then goes to Liverpool, enters the docks, unloads no part of her cargo, takes in more cargo, sails for India, and thence returns sometimes to Liverpool and thence to Glasgow, and sometimes to Glasgow direct. When one of these steamers reaches Liverpool from Glasgow and enters the docks, is she "trading inwards" within the meaning of that expression as used in the section in question?

No evidence was adduced as to the meaning of the phrase, if it be a technical one which admits of such evidence. The course of business pursued by the plaintiffs' steamers was at the passing of the Act less common than it is now; but it is not shewn to us either by evidence or admission whether such a course of business was existing or non-existing at that time. We are therefore constrained to ascertain the meaning of the words in question from our knowledge of the English language, aided by the light which the section of the statute throws on them, and by the course of business which we know to be pursued in ports and docks. The words "trading inwards" would, we think, most naturally, and therefore primarily, apply to the case of a vessel entering the docks for the purpose of discharging her cargo; but we think that the words may without violence describe also any vessel laden with goods in the course of trade entering the docks for the purposes of her trade, whether loading or unloading, and thus include one of the plaintiffs' vessels arriving from Glasgow; for she is a vessel on a trading voyage: she is a trader, and she enters inwards. Are the words used in the statute in the first of these significations only or in both? The section is far from clear: but a study of it convinces us that the following propositions may be evolved from it: (1.) That all vessels entering into the docks, as well as all vessels leaving the docks, are made liable. (2.) That vessels entering the docks are subdivided into two classes, and two classes only, namely, those described as trading inwards, and those described as arriving in ballast. (3.) That vessels leaving the docks are capable of subdivision into six classes: first, those trading inwards and trading outwards; secondly, those trading inwards and leaving in ballast;

thirdly, those arriving in ballast and trading outwards; fourthly, those arriving in ballast and leaving in ballast; fifthly, those built within the port and trading outwards; sixthly, those built within the port and going out in ballast; and that all these classes except the last are referred to in the section, and are the subject of express charges. (4.) That no vessel is to pay both inward and outward rates. (5.) That inward rates are to be paid preferentially, as is shewn, amongst other things, by the provision that one arrival followed by one departure is treated as one voyage, and not one departure followed by one arrival; and, further, by the enactment of s. 247, that the rates in question shall be paid on the arrival of the vessel.

We have thus stated the conclusions at which we have arrived from a study of the section in question. It is not easy to explain every word in it in accordance with any one of the interpretations suggested to us; nor should we usefully occupy time in a minute criticism of every expression of a somewhat clumsily drawn clause. It may, however, be well to observe that a strong argument was raised on the word "or" in the expression "vessels built within the port of Liverpool *or* trading outwards," in the third paragraph of the section in question. But in our opinion the word "or" must be read "and": for the general drift of the clause requires this, and in the description of what must be the same class of vessels at the end of the clause, and is therefore, strictly speaking, a parallel passage, we find the word "and" substituted for "or," and the class of vessels described as "vessels built in the port of Liverpool *and* trading outwards."

If the view of the section above stated be correct, the plaintiffs' steamer when she enters the dock must be either, (1) a vessel in ballast; or (2) a vessel trading inwards; or (3) her case is omitted. But she is plainly not a vessel in ballast, for her contents are goods, not ballast. No casus omissus can be admitted where the section declares that all vessels entering the port are charged; therefore she is a vessel trading inwards.

This conclusion, to which we are driven by the section itself, appears to us, for the reasons already given, to do no violence to the words "trading inwards," and to be in accordance with the

1887

HENDERSON BROTHERS v. MERSEY DOCKS AND HARBOUR BOARD.

FRY, L.J.

general scheme of the enactment, which prefers in every case an entering to a leaving charge.

It was contended that the dock company are at liberty to charge the plaintiffs' vessels as if the course began in India, and as if one departure with one subsequent arrival constituted one voyage. In our opinion this contention cannot prevail; for in fact each of the vessels has first arrived from Glasgow, and not from India, and she is required to pay on that arrival; and, secondly, the statute declares one arrival with (i.e., followed by) one departure to be one voyage, but contains no declaration in favour of one departure with or followed by one arrival.

In our opinion the declaration of the learned judge should be varied by declaring that the defendants are entitled to charge in respect of every ship of the plaintiffs arriving from Glasgow and sailing for India, as mentioned in paragraph 2 of the statement of claim, the dock tonnage rates as on a ship trading inwards from Glasgow, and in respect of every ship of the plaintiffs arriving from India and sailing for Glasgow, as also mentioned in the said paragraph of the statement of claim, the dock tonnage rate as on a ship trading inwards from India. In our opinion this variation in the judgment ought not to affect the costs of this appeal, which should be borne by the appellants.

Judgment accordingly.

Solicitors for plaintiffs: *Gregory & Co., for Hill, Dickinson, Lightbound, & Dickinson.*

Solicitors for defendants: *Gregory & Co., for Squarey.*

E. L.

[IN THE COURT OF APPEAL.]

1887
May 17.

LYON *v.* MORRIS AND ANOTHER.
MUTUAL LOAN FUND ASSOCIATION, CLAIMANTS.

Practice—Interpleader—Appeal—Decision in a summary Manner—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Rules of Supreme Court*, 1883, *Order LVII., rr.* 8, 11—*Bill of Sale—Power to have Goods valued and purchase them—Term for Maintenance of Security—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule.*

A summary decision under Order LVII., r. 8, by a judge at chambers, on an interpleader summons, is final and conclusive, and no appeal lies from such decision, and there is no power to give leave to appeal.

So *held*, by the Court of Appeal, affirming the decision of the Queen's Bench Division.

Per Day and Wills, JJ. A power given to the grantee of a bill of sale to sell the goods "or to have them valued, and to purchase them at such valuation, and receive the moneys to arise from such sale or valuation," is not a term for the maintenance of the security within the meaning of the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and, therefore, a bill of sale which contains a clause giving such power is void by s. 9.

INTERPLEADER SUMMONS raising the question whether a bill of sale was valid or not.

By consent of the parties the question was decided at chambers in a summary manner under Rules of Supreme Court, 1883, Order LVII., r. 8, by Huddleston, B., who held that the bill of sale was valid, but gave the execution creditor leave to appeal against his decision.

The bill of sale, after giving to the grantees a power of entry and seizure, continued as follows: "And also on, or at any time after, the time mentioned in the 13th section of the said Act, to sell the same by public auction or private contract, together or in lots, on the premises where the same shall be found, or at any other place whatsoever, for such prices as can be reasonably gotten for the same, or to have them valued, and to purchase them at such valuation, and receive the moneys to arise from such sale or valuation, and therewith in the first place to reimburse themselves or himself all costs, charges, or expenses which they or he may incur or sustain in and about obtaining possession

1887

LYON v. MORRIS.

of the same, and in payment of rent, rates, taxes, and insurance, for the premises wherein the same shall be found, and about making any such sales, and also about the recovery of the said sums of 80*l.* and interest, and after the payment of all such costs and expenses and moneys to account for the surplus if any unto the grantor."

March 30. *Woolf*, for the claimants under the bill of sale, took a preliminary objection to the hearing of the appeal. There is no right of appeal, and no power to give leave to appeal. This is clear from s. 17 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which is still in force. Order LVII., r. 11, of the Rules of 1883, cannot give power to give leave to appeal contrary to the express words of that section, for appeal is not matter of procedure. The decision now appealed from is therefore final: *Shortridge* v. *Young* (1); *Attorney-General* v. *Sillem* (2); *Dodds* v. *Shepherd* (3); *Turner* v. *Bridgett* (4); *Waterhouse* v. *Gilbert* (5); *Bryant* v. *Reading*. (6)

A. T. Lawrence, (*Cluer*, with him), for the appellant. Order LVII., r. 11, is a rule as to procedure and is valid. It gives an appeal by leave, and to that extent modifies the provisions of s. 17 of the Common Law Procedure Act, 1860. Moreover that section does not affect the present case, for it was only intended to apply to cases where the right to interplead was given by that Act. It follows that there is an appeal here by leave: *Witt* v. *Parker* (7); *Robinson* v. *Tucker* (8); *Dawson* v. *Fox* (9); *Webb* v. *Shaw*. (10)

[DAY, J.:—Before deciding as to the preliminary objection we will hear the case on the merits.]

A. T. Lawrence, for the appellant. The bill of sale gives power to the grantee to get possession of the goods at his own valuation, and afterwards to take other proceedings to recover the balance. This is a departure from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43). The clause in question would alter the legal rights

(1) 12 M. & W. 5.
(2) 10 H. L. C. 704.
(3) 1 Ex. D. 75.
(4) 9 Q. B. D. 55.
(5) 15 Q. B. D. 569.
(6) 17 Q. B. D. 128.
(7) 46 L. J. (Q.B.) 450.
(8) 14 Q. B. D. 371.
(9) 14 Q. B. D. 377.
(10) 16 Q. B. D. 658.

of the grantor and grantee as given by the Act and form, and therefore the bill of sale is invalid: *Davis* v. *Burton* (1); *Blaiberg* v. *Beckett* (2); *Furber* v. *Cobb.* (3)

Woolf, for the respondents. The bill of sale is good. The clause is for the maintenance of the security. If it were unreasonable that would not avoid the bill of sale, but it is reasonable, for the object is to avoid the expense of an auction: *Ex parte Stanford, In re Barber* (4); *Goldstrom* v. *Tallerman* (5); *Ex parte Official Receiver, In re Morritt* (6); *Watkins* v. *Evans.* (7)

DAY, J. In this case an appeal has been entered against the decision of Huddleston, B., at chambers, where he determined an interpleader issue by consent. He decided that the bill of sale was good, and gave leave to appeal, and the execution creditor now appeals. A preliminary objection has been taken, on behalf of the claimants under the bill of sale, that no appeal lies from the decision of a judge on an interpleader summons in a summary manner where the parties have agreed to leave the question to him.

It becomes necessary to consider the origin of the jurisdiction to deal with questions of interpleader in a summary manner at chambers. The Act of 1831 (1 & 2 Wm. 4, c. 58) was passed for the purpose of facilitating interpleader proceedings. Sect. 1 of that statute applied to cases other than those where the application was by the sheriff, and s. 6 was for the relief of sheriffs. In the present case the application is by the sheriff. Now it is clear, on looking at the terms of ss. 1 and 6 of the Act of William IV. that there was power under that statute by consent to decide the question in such a case in a summary manner, and s. 2 provided that the decision in a summary manner should be final and conclusive. Afterwards the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), was passed, which extended the summary powers already existing, by giving power to decide in a summary way in other cases besides the case provided for by the

(1) 11 Q. B. D. 537.
(2) 18 Q. B. D. 96.
(3) 18 Q. B. D. 494.
(4) 17 Q. B. D. 259.
(5) 18 Q. B. D. 1.
(6) 18 Q. B. D. 222.
(7) 18 Q. B. D. 386.

1887

LYON v. MORRIS.

Day, J.

earlier Act. By s. 14 power was given at the request of either party to decide summarily where, from the smallness of the amount in dispute, or of the value of the goods seized, it seemed desirable, and, by s. 15, where the question was one of law, and the facts were not in dispute, there was power to decide without directing an action or issue.

Sect. 17 of this Act is in the same terms as s. 2 of the earlier Act; it provides that, "The judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

The Act of William IV. is now repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), and so are the interpleader sections of the Common Law Procedure Act, 1860, with the exception of s. 17, which remains unrepealed and isolated. The Rules of the Supreme Court, 1883, contain provisions similar to those of the repealed Acts as to the power of summary decision in interpleader, and it is therefore important to ascertain the true meaning of the old Acts. Looking at the terms of s. 2 of the Act of 1831 and s. 17 of the Act of 1860, if I had to construe the clause for the first time, and if the question were res nova, I should think that the object of the legislation was not to deprive anyone of any right of appeal already existing, but that the intention was that the judgment should work as an estoppel against all parties. Ordinarily speaking there was not any appeal from the decision of a judge at chambers, where he was exercising an original jurisdiction conferred upon him by statute, for he was given summary powers, the exercise of which was not subject to the control of any Court. But it seems to have been thought that the sections to which I have referred did contain provisions against appeals. Sect. 17 of the Common Law Procedure Act, 1860, is still in force, but, with that exception, the provisions as to interpleader are now contained in the Rules of 1883, Order LVII. Rule 11 of that Order provides that: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary

way under rule 8 of this order, shall be final and conclusive against the claimants, and all persons claiming under them."

"Claimants," there, it should be observed, means all parties to the proceedings, and not merely claimants in the more restricted sense, as opposed to execution creditors. If the rule had stopped there I should have thought the meaning would have been the same as that which I should have been inclined to attribute to ss. 2 and 17 of the two earlier Acts, but it goes on, "unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal."

This last part of the rule must be applicable to appeals. That is the history of the legislation on the subject, and I think it shews that the judges who framed the Rules of 1883 must have thought that ss. 2 and 17 of the earlier Acts related to appeals.

The question in the present case is whether there is any appeal or not. If my construction were right there would be an appeal, but I must come to the conclusion that I have put a wrong construction on s. 17 of the Common Law Procedure Act, 1860, and that it was intended to apply to appeals. The question is difficult, and we get no help from the cases which have been decided, for they lay down no principle by which we can be guided, but we find that there has been a series of provisions on the subject, and then came Order LVII., r. 11, which clearly applies to appeals. The words "except where otherwise provided by statute" do not apply here, because s. 17 of the Common Law Procedure Act, 1860, does not "otherwise provide."

In the present case special leave to appeal was given, and the question is whether that can entitle parties to appeal, where a statute expressly provides that the decision shall be final and conclusive. The best construction I can put on the legislation is that I must abandon my view as to the meaning of ss. 2 and 17 of the earlier Acts, and hold that no appeal lies. If my judgment were unfettered I should have come to a different conclusion, and should have thought that the sections in question were not intended to apply to appeals, but only to make the decision operate as an estoppel, but the words of Order LVII., r. 11, shew that that rule was intended to apply to appeals, and that being so, I think I am bound to hold that s. 17 of the Act of 1860

1887

LYON v. MORRIS.

Day, J.

applies to appeals, and provides that the decision shall be final in the sense of not being subject to appeal. The Court of Appeal has held, in *Dawson* v. *Fox* (1), that where an issue was tried by a judge without a jury his decision was open to appeal. I confess that I cannot reconcile that decision with any satisfactory explanation that I can give.

For the reasons which I have given I feel obliged to hold that by the provisions of s. 17 of the Common Law Procedure Act, 1860, there is no appeal in the present case.

We have heard the case argued on the merits, and if I thought there was any right of appeal I should be prepared to hold that the bill of sale was bad, on the ground that the provision that on default in payment the grantees might sell the goods, or, if they preferred it, need not sell them, but might have them valued, and purchase them themselves, was not a term for the maintenance of the security. A power of sale in a bill of sale is perfectly legitimate, and other covenants for the maintenance of the security may be added, and in my judgment maintenance does not mean merely maintaining the thing in esse, but means the maintenance of the thing considered as a security, and includes the mode of sale. It means the maintenance of the security until it is realised. It is clear to my mind that all reasonable provisions for sale are terms for the maintenance of the security, but this is not a provision for sale, but a provision to enable the creditor to get the property, not in satisfaction of the debt, but to take it at a valuation which may be utterly inadequate, and, if that valuation is below the amount of the debt, to recover the balance by other means. That is not a term for the maintenance of the security, but is a provision to enable the creditor to obtain a most objectionable and illegitimate profit and emolument, and therefore I should desire if it were possible to allow the appeal, but on the ground that no appeal lies it must be dismissed.

WILLS, J. The provision as to purchasing the goods at a valuation in my judgment is not a term for the maintenance of the security, and is not legitimately within the terms of the form in the schedule to the Bills of Sale Act of 1882, and

(1) 14 Q. B. D. 377.

therefore I agree that if an appeal lay the bill of sale ought to be held void.

It becomes necessary, therefore, to decide whether there is any appeal. The whole question, to my mind, is a legal puzzle, and there is great difficulty, but the conclusion to which I have come on the whole is, that no appeal lies.

It is material to observe the dates. The Rules of 1883 were framed at some time prior to August 4, 1883, and the Statute Law Revision Act and Civil Procedure Repeal received the royal assent on August 25, which shews that that it was framed with reference to the Rules. Both came into force on October 24, 1883. I think s. 17 of the Common Law Procedure Act, 1860, was left untouched in order that it might be read together with the Rules. Mr. Lawrence argued that it only applied where the right to interplead was given by the Act of 1860, but that construction would produce this anomalous result, that it would not confine finality to small claims, but would also apply where an issue was directed in any case in which the right to interplead was given by that particular statute, and yet would have no application to any other case. I cannot see why that class of cases should have been selected for the purpose of applying the provisions of s. 17 to them only, to the exclusion of all others.

The section is preserved, and is meant to be read with the new Rules. It seems to me, therefore, that it is general in its application, and provides that where a judge has decided summarily because the parties have consented to that mode of dealing with the matter, his decision is final and conclusive. It is difficult to give a satisfactory view of the intention and effect of the different provisions; but I am disposed to think that the words "except where otherwise provided by statute" in Order LVII., r. 11, were intended to apply to cases under the Act of William IV. as well as to cases under the Common Law Procedure Act, 1860. In *Waterhouse* v. *Gilbert* (1) the Court of Appeal decided that where there had been a summary decision there was no right of appeal, and that they had no jurisdiction to give leave to appeal from the Divisional Court.

In *Dawson* v. *Fox* (2), also in the Court of Appeal, it was held

(1) 15 Q. B. D. 569. (2) 14 Q. B. D. 377.

1887

LYON v. MORRIS.

Wills, J.

that though the judgment on the issue was final, yet the preliminary decision of the judge was open to appeal. The result appears to be this: where the complaint is that the judge has misdirected the jury in point of law there is an appeal; from the judgment in the issue of a judge without a jury on a point of law there is no appeal; where the objection taken is that the judge is wrong as to a finding of fact at the trial before him without a jury there is an appeal; from the judgment in the issue founded upon the decision of questions of fact there is no appeal.

Had the matter been free from authority I should have been disposed to think that s. 17 of the Act of 1860 was originally intended only to make the judgment binding as against all parties, and not to take away or interfere with any right to appeal, but that is not the construction which has been put upon it.

The result is that this appeal must be dismissed.

Appeal dismissed.

P. B. H.

The execution creditor appealed.

May 17. *A. T. Lawrence*, and *Cluer*, in support of the appeal. What happened at chambers was that no facts being in dispute, the question of law was determined by the judge under Order LVII., r. 9, and there was therefore a right of appeal. But supposing the case was heard by consent under rule 8 there is still an appeal. That rule deals with two cases, the consent of both claimants to the judge deciding the case, and the decision of the judge on the application of one claimant that it is desirable to dispose of the case, followed by a hearing and decision of the case itself. Here there was no preliminary judicial decision on the propriety of dealing with the case summarily. It was then simply a hearing by consent under the first part of rule 8. To such a hearing there is no statute applicable restricting the right of appeal, and consequently leave may be given under rule 11 of Order LVII. Sect. 17 of the Common Law Procedure Act, 1860, in declaring that the decision of the Court or a judge in a summary manner is to be final, refers only to decisions under s. 14 of

that Act where the judge thinks it right, from the nature of the case, to dispose of the merits. In all other cases an order made in pursuance of 1 & 2 Wm. 4, c. 58, by a single judge not sitting in open Court was, by s. 4 of that Act, liable to be rescinded or altered by the Court in like manner as other orders made by a single judge: *Shortbridge* v. *Young*. (1) That is altered by Order LVII., r. 11, to this extent only, that leave has to be given to appeal.

Woolf, for the claimants under the bill of sale, was stopped.

FRY, L.J. The question that arises on this case is by no means free from difficulty, for it is not easy to put an entirely satisfactory interpretation on rule 11 of Order LVII. I have however come to the conclusion that the object of the exception in that rule was to prevent any collision between the direction contained in the rule and the provisions of any existing statute. Now what were the provisions of existing statutes with regard to interpleader. They are to be found in the first place in 1 & 2 Wm. 4, c. 58. The first section of that Act gave power with the consent of the plaintiff and the third party, that is the claimant, to dispose of the merits of their claims and determine the same in a summary manner. Under this clause it is obvious that the judge is exercising a consensual jurisdiction vested in him by statute. Then under s. 2 the decision of the Court or a judge in a summary manner is to be final and conclusive against the parties and all persons claiming by, from, or under them. That did not take away any right of appeal, because none had been given. I conceive that from the decision of a judge acting at chambers under a statute there would be no right of appeal unless it were given by the statute. In this case, however, the statute by s. 4 goes on to give an appeal, enacting that "every order to be made in pursuance of this Act by a single judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single judge." That only gives a right of appeal with respect to orders similar to those as to which a right of appeal existed, and the short result of the statute therefore was to give power to a judge at chambers to

(1) 12 M. & W. 5.

1887

LYON v. MORRIS.

FRY, L.J.

dispose finally of matters coming before him by consent. It is in effect a declaration that such orders are conclusive and incapable of appeal. That is within the exception in rule 11 of Order LVII. The next inquiry is whether that state of affairs has been altered by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49). The preamble recites that various enactments (mentioned in the schedule to the Act) which relate chiefly to civil procedure or matters connected therewith, and which may be regarded as spent or have ceased to be in force or have become unnecessary, or the subject matter whereof is provided for by the Judicature Act, 1873, and the Acts amending it, or rules made pursuant thereto, or for other reasons may properly be repealed. One of the reasons therefore given for inserting the repeal of enactments is that they are dealt with under the Judicature Acts and rules, and one of the rules that has this effect is rule 11 of Order LVII. I think, therefore, that it is plain that the legislature were not intending to alter the existing law, but only to repeal the statute because its subject-matter had been dealt with by the rules. There is another view which is worthy of consideration, because the statute of Wm. 4 was not the only one that dealt with the matter, there was also the Common Law Procedure Act, 1860, which was in force when the rule was made. Sect. 14 of that Act gave the Court or a judge power, where it was desirable to do so, at the request of either party to determine the matter in a summary manner. That was a new form of summary jurisdiction. Then s. 17 of the Act provides that the decision of the Court or judge in a summary manner shall be final. That is a repetition so far as it goes of s. 2 of 1 & 2 Wm. 4, c. 58. Now what is the meaning of the words "the decision of the Court or judge in a summary manner shall be final and conclusive"? Do they refer only to the new method of determining a question under s. 14 of the Common Law Procedure Act, 1860, or do they include the summary jurisdiction by consent under 1 & 2 Wm. 4, c. 58. The question is not an easy one to decide, but I incline to think that the section includes all these ways of getting a summary decision. I think that must be the view of the legislature when by the Statute Law Revision and Civil Procedure Act, 1883, they repealed the

statute of Wm. 4 but left s. 17 of the Common Law Procedure Act, 1860, untouched. They would not have done that unless they thought that the later statute dealt with the whole matter. If that view is the true one the exception finds a statute on which it can be grafted.

It was suggested that the provision that the decision should be final and conclusive did not preclude an appeal, but on this matter the decision in *Waterhouse* v. *Gilbert* (1) is in point. I am aware that that decision dealt with the exercise of jurisdiction by the master not by consent, but under s. 17 of the Common Law Procedure Act, 1860, but for the purpose of considering the effect of the words "final and conclusive" that case is binding on us. The appeal will therefore be dismissed.

LOPES, L.J. I entirely agree. Rule 11 of Order LVII. is one which I may fairly say it is somewhat difficult to understand, but I think the intention was to preserve the existing legislation. It becomes therefore necessary to consider what provisions were in force at that time. The statute 1 & 2 Wm. 4, c. 58, provides by s. 1 for orders in interpleader matters by consent. It enacts by s. 2 that the decision of a court or judge in a summary manner shall be final and conclusive. But then Mr. Lawrence argues that s. 4 shews that the former section was not intended to take away the right of appeal in cases determined by a judge at chambers. But that is not the way in which I read s. 4. I understand it to mean that orders made in interpleader by a single judge might be rescinded as other orders made by a single judge might be. But orders by consent were not subject to appeal, and so s. 4 does not affect orders by consent under s. 1. The result of the Act, therefore, was that a summary jurisdiction was given to a judge at chambers, from which there was no appeal.

That, according to the view I take, was the law existing at the time when r. 11 of Order LVII. came into force. The Statute Law Revision Act, 1883, seems to me to repeal the statute of Wm. 4 on the ground that its provisions were preserved by the Judicature Rules and Orders. But s. 17 of the Common Law

(1) 15 Q. B. D. 569.

1887

LYON v. MORRIS.

Lopes, L.J.

Procedure Act, 1860, was also in force at that time, and is included in the exception in rule 11. It is said that s. 17 only applies to the preceding 14th section of the same statute which gives jurisdiction when the amount in dispute is small and one party consents, and does not apply to summary decisions made by the consent of both parties. It must, however, be borne in mind that the object of s. 14 was to give increased power to the Court or judge. I cannot understand why the limited interpretation is to be put on s. 17, and I think that section must apply to every exercise of summary jurisdiction, not merely under s. 14 of the same Act but under the previous Act. It seems to me to be unreasonable to say that there is no appeal where only one of the parties consents, but that there is an appeal when both consent and submit to the jurisdiction of the judge. The only other matter is the interpretation of the words "final and conclusive," but that has been determined by the decision in *Waterhouse* v. *Gilbert*. (1) I think, therefore, the decision of the Divisional Court was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for execution creditor: *R. Frederick Hill & Co.*
Solicitor for claimants: *Walter Beard.*

(1) 15 Q. B. D. 569.

A. M.

McHARDY *v.* LIPTROTT.

1887
June 10.

Practice—Appeal from County Court—Time for appealing when there has been a Motion in the County Court for a New Trial.

In an action tried in the county court an appeal will not lie against the decision of the county court judge on an application for a new trial; so that the time within which the unsuccessful party in the county court may appeal to the Queen's Bench Division begins to run from the date of the judgment at the trial, and not from the date of the judge's decision on the application for a new trial.

MOTION by way of appeal from a decision of the judge of the Warrington County Court.

In an action tried before the county court judge and a jury a verdict was given for the defendant on December 30, 1886.

On January 19, 1887, the plaintiff gave notice of motion in the county court for a new trial on the ground of misdirection and on other grounds. The motion was heard, and the county court judge, having taken time to consider his judgment, on February 17 refused the application for a new trial. On March 9 the plaintiff gave notice of motion in the Queen's Bench Division to reverse the judgment of the county court judge, and enter judgment for the plaintiff, or for a new trial.

G. S. Bower, for the plaintiff. The appeal to this Court from the judgment of the county court judge is in time, the notice of motion having been served and the appeal entered within the twenty-one days specified in Order LIX., rule 12, of Rules of Supreme Court, December 1885. *Foster* v. *Green* (1) is an authority that an appeal will lie against the decision of a county court judge on a motion for a new trial. If the appeal is held to be out of time the Court has power to extend the time, and is asked to do so.

There was no appearance for the defendant.

LORD COLERIDGE, C.J. This motion is out of time. We have been supplied by the master with a note of a case in which it was decided in this court that the decision of a county court judge

(1) 6 H. & N. 793.

1887

McHARDY v. LIPTROTT.

upon a motion for a new trial is a decision in an interlocutory proceeding, and that where there has been such a motion in the county court the time for appealing to this Court begins to run from the date of the judgment given at the trial. (1) That decision appears to have been acted upon since as a settled rule of practice, and under those circumstances we cannot grant the indulgence of an extension of time, the effect of which would be to encourage appellants from county courts to pursue in all cases the course which has been pursued in this. *Foster* v. *Green* (2) is not in point. The jury found a special verdict, and the county court judge reserved leave to move to enter a verdict for the plaintiff, or for a new trial. The Court held that the judge had given no final determination or decision in point of law until he pronounced his decision on the motion for a new trial.

DENMAN, J., concurred.

Motion dismissed.

Solicitors for plaintiff: *Philpotts, for H. L. Riley, Warrington.*

(1) The case to which Master Mellor referred the Court is *Morris & Sons* v. *Lowe & Sons*, reported 34 W. R. 45.

(2) 6 H. & N. 693.

W. A.

TONSLEY *v.* HEFFER.

1887
June 20.

Practice—Notice of Trial—Notice of Trial "no longer in force"—Entry of Cause for Trial—Time for Application for a Trial by Jury—Order XXXVI., rr. 6, 16.

By Order XXXVI., r. 6, upon the application within ten days after notice of trial has been given, of any party for a trial with a jury of the cause, an order shall be made for a trial with a jury.

Notice of trial was given by the plaintiff, but the cause was not entered for trial by either party within the time prescribed by the Rules, and the notice was therefore no longer in force. The plaintiff gave a second notice of trial, entered the cause for trial on the same day, and then applied for a trial by jury:—

Held, by Field, J., confirming the order of A. L. Smith, J. (Manisty, J., dissenting), that under Order XXXVI., r. 6, the application for a jury was too late.

Per Manisty, J. The first notice of trial should under the circumstances be regarded as countermanded by consent. The second notice of trial was therefore valid, and the application for a trial by jury was made in time within Order XXXVI., rr. 6, 16.

Appeal from order of A. L. Smith, J., refusing a trial with a jury under Order XXXVI., r. 6. The action was brought by the executrix of the vendor of a public-house against the vendee for balance of purchase-money. Place of trial Middlesex. Notice of trial was given by the plaintiff April 21, 1887, but the cause was not entered for trial during the six days next ensuing. A second notice of trial was given by the plaintiff on May 14, and the case was entered for trial by the plaintiff on the same day. On May 19 the plaintiff applied for a trial by a jury. The application was refused by the master, and on appeal by A. L. Smith, J., at chambers.

The plaintiff appealed. (1)

(1) Rules of Supreme Court, 1883, Order XXXVI., r. 6. "In any other cause or matter upon the application within ten days after notice of trial has been given of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury."

Rule 16. "In London and Middlesex, unless within six days after notice of trial is given, the trial shall be entered by one party or the other, the notice of trial shall be no longer in force."

Rule 19. "No notice of trial shall be countermanded except by consent or by leave of the Court or a judge, which leave may be given subject to

1887

TONSLEY v. HEFFER.

R. Wallace, for the plaintiff. The first notice of trial given on April 21 ceased to be valid on April 27, in consequence of the cause not having been entered for trial, under Order XXXVI., r. 16. The governing date, therefore, as regards Order XXXVI., rr. 6, 16, is May 14, the date of the second notice of trial. The cause having been entered for trial within six days (rule 16), and the plaintiff's application for a jury having been made within ten days (rule 6) of the governing date, the plaintiff has made his application in time, and has an absolute right to a trial by jury.

Blake Odgers, for the defendant. The effect of the two rules is to give the parties for six days after notice of trial an absolute right to a jury, and for four days following these a contingent right to a jury depending on whether or not the cause has been entered for trial within the period during which the right was absolute. After the expiration of the ten days the parties have no longer a claim to a jury as of right. The rules nowhere contemplate a second notice of trial.

FIELD, J. The interpretation of the two rules is difficult, but I have come to the conclusion that the order appealed from was right. Rule 6 is part of a carefully devised system of settling the mode of trial, and, if it stood alone, there could be no doubt that notice of trial having been given in the action on April 21, and ten days from this date having expired at the date of the application for a jury, the application was out of time under rule 6. I think it safer to isolate rule 6 and to construe it by itself according to its plain and literal meaning. As to the precise effect of rule 16 I offer no opinion.

MANISTY, J. I am unable to adopt this view. Unless the effect of the two rules is absolutely to prohibit the plaintiff from having the case tried by a jury, he ought not, in my opinion, to lose his right. It cannot have been intended that if a notice of

such terms as to costs or otherwise as may be just."

Rule 20. "If the party giving notice of trial in London or Middlesex omits to enter the trial on the day or day after giving notice of trial, the party to whom notice of trial has been given may, unless the notice has been countermanded under rule 19, within four days enter the trial."

1887

TONSLEY v. HEFFER.

trial is given one day and countermanded the next for the purposes of an attempt at settlement, the effect of the notice being "no longer in force" (rule 16), shall be to prevent the parties from obtaining a trial by a jury in the simple and inexpensive manner provided by rule 6. As neither party set down the case for trial under the first notice given, that notice became, in my opinion, countermanded by consent, and thereupon the plaintiff acquired a right to give, and did give, a second notice of trial, which was perfectly valid. Having entered the case within six days and applied for a jury within ten days of a valid notice of trial, the plaintiff has complied with both rule 6 and rule 16, and is, in my opinion, entitled as of right to a jury. But as the Court is divided in opinion the order of my Brother Smith will be confirmed.

Order confirmed.

Solicitor for plaintiff: *E. Freeman.*

Solicitors for defendant: *Boulton, Son, & Sandeman.*

H. D. W.

[IN THE COURT OF APPEAL.]

April 30; *May* 27.

BARONESS WENLOCK AND OTHERS *v.* THE RIVER DEE COMPANY.

Practice—Reference for inquiry and report under Judicature Act, 1873, *s.* 56 *—Referee, Application to vary Report of—Power of Referee under s.* 56 *to examine Witnesses—Company borrowing ultra vires—Equity of Lender to be subrogated to Rights of Creditors paid out of Money borrowed—Debt not in existence at Time of Advance.*

The Judicature Act, 1873, s. 56, contemplates an inquiry by the examination of witnesses, and not only an inquiry by personal observation of the referee.

The equitable doctrine by which the lender of money borrowed by a company ultra vires is entitled to be subrogated to the rights of creditors of the company paid out of such money, and to recover from the company the amount of their debts or liabilities so paid off, is not confined to the amount of debts and liabilities existing at the time of the advance and so paid off, but extends to debts and liabilities accruing subsequently to and paid out of such advance.

Blackburn Benefit Building Society v. *Cunliffe, Brooks & Co.* (22 Ch. D. 61) discussed.

APPLICATION to vary the report of a special referee.

The facts were as follows:—

An action had been brought by the plaintiffs, as executors of

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

the late Lord Wenlock, deceased, to recover from the defendants the amount of moneys advanced by the testator to them. The defence set up was in substance that the moneys had been borrowed by the company ultra vires. It appeared that the testator had advanced large sums of money to the defendant company. He had also paid off a previous advance of 56,000*l.* from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal the Court of Appeal varied his judgment, and, by order dated May 9, 1883, ordered that judgment should be entered for the plaintiffs for the amount of 25,000*l.* (that sum being the full amount which the company had power to borrow) and interest, and also that in addition thereto the plaintiffs should recover judgment for so much and so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, and interest from the respective dates of such employment, and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of 25,000*l.* as aforesaid, and the amount of the parts of the said sums so employed as aforesaid and the interest thereon. On appeal to the House of Lords they affirmed the decision of the Court of Appeal. (1) The special referee held an inquiry under the above order, upon which inquiry counsel were heard and witnesses examined, and he thereupon made a report. The plaintiffs now applied to the Court of Appeal to decide certain questions of law raised by such report and to vary the report in certain respects, and there was a cross application to vary such report by the defendants. Various questions arose on the report with regard to items allowed or disallowed by the referee, which the plaintiffs claimed to have allowed under the order of May 9, 1883, but which the defendants contended should be disallowed.

The questions raised were briefly as follows:—

In addition to the portions of the moneys advanced which had been applied to the payment of debts or liabilities of the

(1) 10 App. Cas. 354.

company existing at the time of the respective advances the referee allowed, subject to the opinion of the Court, items in respect of portions of the moneys advanced which had been applied in payment of debts and liabilities of the company which arose subsequently to the respective advances, whereas the defendants contended that he should have disallowed such items and allowed only items in respect of moneys advanced which had been applied in payment of debts and liabilities existing at the date of the advances.

Further questions also arose as after mentioned :—

Certain debts and liabilities of the defendant company had been paid by their bankers. The sums so paid by the company's bankers were paid to them out of the sums advanced by the Rock Life Insurance Company or Lord Wenlock. The plaintiffs claimed to be allowed by the referee the amounts so paid whether the debts or liabilities accrued before or after the advances by the bankers or those by the Rock Company or Lord Wenlock.

A portion of the sums advanced to the defendants by the Rock Company or by Lord Wenlock had been paid over by them to a Mr. Green, who was a managing director and agent of the company, out of which he had made disbursements for the company in the course of their business, e.g., for wages, work done, &c., some of such disbursements being in respect of debts incurred before, and some in respect of debts incurred after the receipt of the money by Green. The plaintiffs also claimed under the order of May 9, 1883, to be allowed the amount of the sums so disbursed.

The plaintiffs further claimed to be entitled to be allowed under the order, in addition to the 25,000*l.* for which they had judgment as being validly borrowed, the amount of all debts and liabilities of the company paid out of that sum of 25,000*l.*

April 28, 30. *Sir Horace Davey, Q.C.*, and *A. R. Kirby*, for the defendants, took a preliminary objection to the plaintiffs' application. They contended that the reference must be considered to have been ordered under s. 57 of the Judicature Act, 1873, not s. 56, on the ground that it was clearly contemplated by the order

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

that there should be a regular judicial inquiry by examination of witnesses, and there was no power under s. 56 of the Act to order such an inquiry, that section being confined to cases where the referee was to inquire by personal observation; and therefore the report stood in the position of a verdict of a jury, and any application to vary it or set it aside ought to be made to the Divisional Court.

Rigby, Q.C., and *R. O. B. Lane*, for the plaintiffs, contrà.

[The following authorities, &c., were cited: Judicature Act, 1873, ss. 56, 57, 58; *Walker* v. *Bunkell* (1); *Cooke* v. *Newcastle Water Company* (2); *Miller* v. *Pilling* (3); *Dunkirk Colliery Company* v. *Lever* (4); Order XXXVI., rr. 48, 50, 52, 54, 55; Order LXI., r. 32, Appendix K., Forms 32, 33.]

LORD ESHER, M.R. This case seems to me very clear. The difference in my opinion between the reference contemplated by s. 56 and that contemplated by s. 57 is that in the one case the Court may adopt, or partially adopt, or reject the report of the referee, as they think right, but in the other case the report has the effect of the verdict of a jury, and can only be set aside in the same way and on the same grounds as a verdict of a jury can be set aside. The reference under s. 56 is to be for inquiry and report. It does not appear to me that the word "inquiry" only includes an inquiry which the referee is to make with his own eyes. The word "inquiry" in my opinion signifies an inquiry in which he is to take evidence and hold a judicial inquiry in the usual way in which such inquiries are held. The word "inquiry" is used because it is not meant to have the same result as a trial. I have consulted judges who have had great experience in the matter, and from what they have told me, and what I know myself, I am convinced that, from the time when the Act came into operation, the section has been treated as having the meaning I have indicated. It seems to me that the section cannot have the limited meaning contended for when we consider that the official referee, to whom the reference under it may be made, is not an expert or a person having any special knowledge

(1) 22 Ch. D. 722.
(2) 10 Q. B. D. 332.
(3) 9 Q. B. D. 736.
(4) 9 Ch. D. 20.

of particular matters. It would be a strong thing after such a consensus of opinion and practice to the contrary to construe the section as suggested by the defendants. I think, moreover, that it would limit the beneficial effect of the section to a most unfortunate extent if it were so construed. I am of opinion that the reference was under s. 56, and that the application is rightly made to this Court.

FRY, L.J. It is very unfortunate that in drawing up these orders for reference the forms given are not strictly followed. If they were, there would be no doubt under which section the order was intended to be made. I have no hesitation, however, in holding that on the face of this order it appears that it was intended to be made under s. 56, the order being one that directs an inquiry and report, and I have no doubt the Court did in fact intend that the referee should take the evidence of witnesses. Such being the order of the Court, the question discussed becomes immaterial. The larger question, however, having been raised with regard to the scope of s. 56, I can only say that I am glad the Master of the Rolls is so clear on the point. For my own part I must say I entertain more doubt whether the intention of the legislature in that section was not merely to enable the Court to order a referee to make inquiry into the subject-matter by personal observation and to report to the Court, and not to enable him to make an inquiry by taking evidence of other people. The Court of Chancery had, under 15 & 16 Vict. c. 80, s. 42, power to procure the report of a scientific expert, and I doubt whether the intention was to do anything more than to give a power of that kind to all the divisions of the Court. The form given in the Appendix to the Rules for use under s. 56 merely directs an inquiry and report, whereas that to be used under s. 57 expressly gives power to examine witnesses. I cannot help thinking that, if it is intended that the referee under s. 56 should have power to administer oaths and hear the evidence of witnesses, it would be much better that the order should expressly give that power. But having given expression to these doubts, I must admit that the practice to the contrary, referred to by the Master of the Rolls, viz. to treat the referee as authorized

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

to take the evidence of witnesses, has been, if not uniform, at any rate very common: and I think that that interpretation of the section is undoubtedly a beneficial one. Therefore, though not without doubt, on the whole I agree with the Master of the Rolls on this point.

LOPES, L.J. To my mind it is clear that this reference was ordered under s. 56 of the Act. It is not easy to construe ss. 56–59 and the rules applicable thereto. The forms, too, raise a difficulty. The form given for use under s. 57 no doubt gives express power to examine witnesses, whereas that under s. 56 does not, but the forms are not part of the Act. Sects. 56 and 57, however, clearly contemplate different kinds of report; the one kind of report is a report to be made to the judge or Court requiring information; the other is to be equivalent to the verdict of a jury, in the case of which any application to set it aside or vary it must be made to a Divisional Court. The reference under s. 56 is for inquiry and report, and the question is whether under those words the referee is to be in a position to examine witnesses. On the best consideration I can give to the matter, I agree with the view expressed by the Master of the Rolls.

Objection disallowed.

April 30; May 2, 3, 10. *Rigby, Q.C.*, and *R. O. B. Lane*, for the plaintiffs. The terms of the order of May 9, 1883, include all debts or liabilities of the company paid out of the advances of the plaintiffs' testator whether existing at the date of the advances or not. The doctrine of equity by which the lender or quasi-lender of money borrowed by a company ultra vires is subrogated to the rights of a creditor of the company whose debt has been paid off out of the money so borrowed is not confined to cases where the debt was in existence at the time of the advance, but applies to all debts and liabilities of the company paid off out of the money so borrowed whether accruing before or after the advance. The principle upon which this equity depends is discussed in the case of *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), and in the judgments in that case there is no

(1) 22 Ch. D. 61; also 9 App. Cas. 857, not on this point.

trace of the limitation of the doctrine suggested by the defendants. If the company have had the benefit of the money so advanced by its application to debts or liabilities validly incurred by the company and which they were bound to meet, the person who has advanced the money is then subrogated to the rights of the creditors so paid off. The principle is that equity will follow the money, which remains in equity the property of the quasi-lender, and wherever it can find any security or piece of property representing the money, the quasi-lender is entitled thereto: and therefore, so far as the money has been applied for the benefit of the company, it is to be treated in equity as existing in the coffers of the company and must be repaid, not as money borrowed, but as money which still belongs in equity to the lender. The test is whether the transaction has added to the liabilities of the company, and, so far as the advance has been applied to debts or liabilities which the company has validly incurred, whether before or after the advance, the company's liability is not increased.

The same principle applies to the cases where debts and liabilities of the company were paid by the company's bankers and the bankers were paid or repaid the amounts so paid by them out of the moneys advanced by the plaintiffs' testator, whether such debts and liabilities accrued before or after the advances by the plaintiffs' testator or the advances by the bankers. The bankers would have an equitable right to be subrogated to the rights of the creditors so paid off, and such equitable right is a liability of the company which would come within the terms of the order of May 9, 1883, and the doctrine above alluded to. The same reasoning covers the sums paid to Green out of the advances by the plaintiffs' testator. These sums were applied to meet liabilities of the company, and the company's liabilities were not thereby increased; equity will follow the money into debts or liabilities of the company whether its application to such debts or liabilities is direct or through many hands and steps. It is further contended that by the express terms of the order of the 9th May the plaintiffs are entitled to any portion of the 25,000*l.* validly advanced which has been applied to the payment of debts and liabilities of the company, in addition to their judgment for the 25,000*l.* as money legally borrowed.

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

[They cited *In re Blackburn Benefit Building Society* (1); *Walton* v. *Edge* (2); *Blackburn Benefit Building Society* v. *Cunliffe, Brooks & Co.* (3); *Knatchbull* v. *Hallett.* (4)]

Sir Horace Davey, Q.C., and *A. R. Kirby*, for the defendants. The order of May 9, 1883, must be construed with reference to what the Court may consider to be the correct doctrine of equity as to subrogation in such cases. It is contended that the view of the doctrine on the subject contended for on behalf of the plaintiffs is far too wide and sweeping. The argument for the plaintiffs amounts to this: viz., that the rule which forbids borrowing money ultra vires is practically abrogated wherever it can be shewn that money so borrowed was applied to the purposes of the corporation, that is to say, that as between the directors and the shareholders it was not misapplied. The doctrine of *Blackburn Benefit Building Society* v. *Cunliffe, Brooks & Co.* (5) only applies to debts and liabilities existing at the time of the advance which have been satisfied out of it. So far as such debts and liabilities are concerned, it is clear that there has been no increase of the liability of the company. It is merely a substitution of one creditor for another. Altogether different considerations arise when the money borrowed is applied to payment of a liability subsequently incurred and which might never have been incurred if the money had not been borrowed. The extension of the equitable doctrine now sought to be made would have the most dangerous effects, as enabling companies practically to borrow without limit.

[LORD ESHER, M.R. But even if the doctrine be limited to debts previously incurred, the company have only to postpone the borrowing until after they have incurred the liability.]

The true principle is, that there is supposed to have been an assignment of the debt paid out of the advance to the person making the advance; that the quasi-lender really pays his money to the creditor and takes an assignment from him of the debt; but that supposed assignment is only applicable to the case of debts in existence at the time of the advance. In the previous

(1) 24 Ch. D. 421.
(2) 10 App. Cas. 33.
(3) 29 Ch. D. 902.
(4) 13 Ch. D. 696.
(5) 22 Ch. D. 61.

cases on the subject the question arose with regard to existing debts.

[They cited on this point *In re Cork and Youghal Ry. Co.* (1); *In re German Mining Co.* (2)]

With regard to the other matters, viz., the moneys paid by the defendants' bankers in respect of debts of the company and repaid out of Lord Wenlock's advances and the moneys paid to Green similar questions arise. It is contended with regard to these items that the equity relied upon by the plaintiffs is confined to sums directly applied by the company, or their agent, out of the moneys borrowed, in satisfaction of existing debts or liabilities of the company. An equity that the bankers might have in respect of sums advanced by them for the payment of debts or liabilities is not a debt or liability within the order of May 9, 1883. It is submitted, also, that the equity to be subrogated to the rights of a creditor cannot be carried beyond persons to whom the money is directly paid in the first instance by the company or their agent; and that, unless such person is a creditor, the equity does not arise. Consequently the amounts disbursed by Green in respect of debts accruing after the receipt of the money by him must be disallowed on the ground that, when the money was received by him, Green was not a creditor of the company in respect of these amounts. It would lead to endless inquiries and difficulties if the money had to be traced through several persons to see whether it ultimately was applied to the company's purposes.

It is clear that the plaintiffs' contention as to the debts paid out of the 25,000*l.* validly borrowed cannot be right, for the plaintiffs would be getting the same thing twice over if it were; and the terms of the order rightly construed exclude such contention. The money being validly borrowed was, when it got into the defendants' hands, the defendants' own money, and the equity to subrogation to the rights of the creditor cannot apply, for it depends on the doctrine that equity will treat the money borrowed as still remaining the quasi-lender's property, which only applies when the money is borrowed ultra vires.

Rigby, Q.C., in reply.

Cur. adv. vult.

(1) Law Rep. 4 Ch. 748. (2) 4 D. M. & G. 19.

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

May 27. The judgment of the Court (Lord Esher, M.R., Fry, and Lopes, L.JJ., was delivered by (1)

FRY, L.J. The questions which now require determination in this case arise from the application of the order of this Court of May 9, 1883, to the facts as found by Mr. Robinson, the special referee named in the order.

By that order it was directed that judgment should be entered for 25,000*l.* and interest, and in addition thereto for so much and so much only of the sums advanced to the defendant company by the Rock Life Assurance Company and Baron Wenlock as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment. It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the direction in the order. The plaintiffs contend that all these advances are within the direction, and that the date of the accruer of the liability is immaterial. We are of opinion that the plaintiffs' contention ought to prevail. We are not at liberty to travel beyond or review the declaration contained in the order of May 9, 1883, which is binding on us not only as a decision of this Court but by reason of its affirmation by the House of Lords: and in our opinion the order rightly bears the wider construction. It is silent as to any limit of time within which the liabilities are to accrue, or within which they are to be paid: and by fixing the respective dates of the employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment and not of the advance is the material one. If the Court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would

(1) It should perhaps be mentioned that the facts and a portion of the arguments and judgment which had relation to a point in the case which has not been thought to require a report have been omitted.

have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it.

But we go further and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys: and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company: in the coffers of the company the money really advanced as a loan is still thought of by the Court as the money of the quasi-lender: and the Court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the Court. The true limit of the doctrine we conceive to be stated by Lord Selborne, L.C., in delivering the judgment of this Court in the case of the *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1): "The test," said he, "is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity: and, if the result

(1) 22 Ch. D. 61, at p. 71.

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

Fry, L.J.

is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." Now the payment of bonâ fide liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the company and therefore in no way transgresses the boundaries of the doctrine as laid down by this Court in the case to which we have referred. Sir Horace Davey forcibly warned us of the danger of the proposition which we have laid down, and said that it would afford to companies a facile means of evading the limit of their borrowing powers. But the danger appears to us imaginary. We do not think that capitalists will be found knowingly and willingly to advance money in the hope of recovering it on the ground of some future subrogation to the future rights of some future creditor. The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension of the doctrine will leave the plaintiffs heavy losers.

The next question arises in this way. Certain creditors of the company were paid by the bankers of the company: these bankers were paid by the advances of the Rock Company or Lord Wenlock: are the plaintiffs entitled to be subrogated to the rights of these creditors? It appears to us that they are entitled to be so subrogated: that the right of the bankers, which they obtained by subrogation from the creditors whom they paid, was an equitable liability of the company: and that for the purposes of this inquiry it is immaterial whether the rights of the creditors accrued before or after the advances by the bankers, or the Rock Company, or Lord Wenlock.

A similar question was discussed as to a Mr. Green, who was a managing director and agent of the company, and to whom payments were made by the company out of which he made disbursements for the company. It was argued that the inquiry must stop at the first payment by the company. But we can find no ground for this contention. To follow the money into a debt or liability of the company does not add to the liabilities of the company whether that pursuit be through one or more hands and by one or many steps.

It is conceded that under the order of May 9, 1883, the plaintiffs are entitled to the 25,000*l.* and to so much of the sums advanced beyond the 25,000*l.* as was expended in satisfaction of the debts and liabilities of the company. The plaintiffs contend that they are entitled, in addition to all this, to so much of the 25,000*l.* itself as was so expended. They contend that this is given to them by the express terms of the order, and that the point, therefore, is not open to further consideration. We do not so read the order; for it appears to us that the 25,000*l.* is dealt with separately, in the first place, and that the rest of the order deals with sums in every respect outside of and beyond the 25,000*l.* The words in the order "in addition" exclude, in our opinion, all further consideration both of the borrowing of the 25,000*l.* and of its application. And in our opinion this is right in point of reason and principle: for the 25,000*l.* having been validly borrowed became part of the moneys of the company as much as the original subscriptions of the members or the produce of sales of its lands; and no application by the company of its own moneys to the payment of its own debts can be conceived of as a transaction between a quasi-lender to the company and the creditors of the company, or lead to a subrogation of the creditors' rights to the stranger. If the plaintiffs were to be subrogated to the rights of those creditors who were paid with the 25,000*l.*, we do not see why they should not be subrogated to the rights of every creditor paid by the company with its own moneys from any source whatever.

The matter must be referred back to the referee with the following declarations, and the costs of the hearing, which has led to partial success and failure on each side, must be costs in the cause. [Then followed formal declarations as to the mode of taking the account under the order of May 9, 1883, in accordance with the principles laid down by the judgment of the Court. The substance of such declarations, so far as material to this report, was that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company which had been paid out of the sums advanced by the Rock Insurance Company or by Lord Wenlock, whether such debts and liabilities existed at the time of or accrued subsequently to the dates of the respective advances:

1887

BARONESS WENLOCK v. RIVER DEE COMPANY.

Fry, L.J.

that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company which having been paid by Messrs. Herries & Co. (the defendants' bankers), or others had been paid or ultimately repaid to them out of any sums advanced by the Rock Insurance Company or by Lord Wenlock, whether such debts or liabilities existed at the time of or accrued subsequently to the dates of the respective advances by the Rock Insurance Company or Lord Wenlock or the dates of the payments by Messrs. Herries & Co. or others: that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company paid by Green out of moneys paid to him by the company, whether such debts or liabilities existed at the time of or accrued subsequently to the receipt by him of the moneys out of which he paid them: and that the plaintiffs were not entitled to be allowed anything in respect of debts or liabilities of the defendants paid out of the 25,000*l.* validly borrowed.]

Judgment accordingly.

Solicitors for plaintiffs: *Emmet, Son, & Stubbs.*
Solicitors for defendants: *Ashurst, Morris, Crisp, & Co.*

E. L.

June 16.

SOUTH STAFFORDSHIRE WATERWORKS COMPANY *v.* STONE.

Justices—Practice—Power of Justices to state a Special Case under Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* c. 49), *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.

A court of summary jurisdiction has no power to state a special case under The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, unless an application has been made to the court in writing, and unless a copy of such application has been left with the clerk of the Court within seven days from the date of the proceeding to be questioned, according to the Summary Jurisdiction Rules, 1886, r. 18.

CASE stated by justices of the county of Stafford under The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

The respondent contended that the justices had no power to state a case, on the ground that no proper application had been made in accordance with The Summary Jurisdiction Rules, 1886,

1887

SOUTH STAFFORDSHIRE WATERWORKS COMPANY v. STONE.

r. 18. (1) It appeared that at the hearing an oral application for a case had been made on behalf of the appellants, and granted by the justices sitting in court. A written notice of appeal was served by the appellants within seven days from the oral application on the clerk to the justices.

Hugo Young, for the respondent. There has been no application for the case according to The Summary Jurisdiction Rules, 1886, r. 18. Two processes are thereby prescribed, an application in writing to the justices, and the leaving of a copy of this application with the clerk to the justices. The right to have a case stated depends entirely on the due observance of these formalities. (He cited *Ex parte Curtis.* (2))

Wills, for the appellants. Sect. 33, sub-s. 1, gives a person aggrieved an absolute right to apply for a case. Sect. 33, sub-s. 2, and rule 18, are mere directions as to procedure, and do not limit the absolute right created by s. 33, sub-s. 1. Here there had been a successful oral application to the justices while sitting, and another application was superfluous. There was also a substantial compliance with rule 18 by service of a notice of appeal on the clerk to the justices within the statutory period. (He cited *Reg.* v. *Judge of Bloomsbury County Court.* (3))

LORD COLERIDGE, C.J. Our decision on this preliminary objection must be in favour of the respondent. Whatever be its merits we cannot entertain the appeal, because the statutory conditions of appeal have not been complied with. The Summary Jurisdiction Act, 1879, which creates the appeal (s. 33, sub-s. 2), states expressly "the application shall be made and the case stated" according to the rules under the Act. The 18th of the

(1) Summary Jurisdiction Act, 1879, s. 33: "(1.) Any person aggrieved . . . . may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned. . . . . (2.) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act." Summary Jurisdiction Rules, 1886, r. 18: "An application to a Court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned."

(2) 3 Q. B. D. 13.

(3) 17 Q. B. D. 788.

1887

SOUTH STAFFORDSHIRE WATERWORKS COMPANY v. STONE.

Summary Jurisdiction Rules, 1886, in the plainest manner directs that "an application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing and a copy left with the clerk of the court." We have been invited to interpret this rule in such a manner as to hold that it has been complied with, when the only application to the justices has been an oral application, and when the document left with the clerk has been a so-called copy of which there never was an original. To do this would be to make a new rule.

DENMAN, J., concurred.

Appeal dismissed.

Solicitors for appellants: *Burton, Yeates, Hart, & Burton, for Johnson, Barclay, Johnson, & Rogers, Birmingham.*

Solicitors for respondents; *Wilkins, Blyth, & Dutton, for Wright, Son, & Hollins, Oldbury.*

H. D. W.

June 14.

HARPER *v.* DAVIS.

County Court—Payment into Court with Denial of Liability—County Courts Act, 1846 (9 & 10 *Vict. c.* 95), *s.* 82—*County Court Rules*, 1886, *Order IX., rr.* 11, 12—*Forms* 103, 104—*Order LI., r.* 27.

The defendant in an action in a county court paid money into court, stating at the same time in a memorandum addressed to the registrar that the payment was made "without prejudice to the defendant's defence to this action and while denying the plaintiff's cause of action":—

Held, by Day, J., and Wills, J., that the payment into court was not an admission of liability, and that the defendant was entitled to dispute his liability at the hearing.

Per Wills, J:—The County Court Rules, 1886, embody the results of the decision in *Berdan* v. *Greenwood* (L. R. 3 Ex. D. 251), and apart from the notice the defendant was entitled to pay money into court and afterwards to dispute his liability at the hearing.

APPEAL from the Birmingham County Court. The action was for trespass to goods. The appellant paid into court the sum of 2*l.* with 2*s.* for costs, stating at the same time in a memorandum addressed to the registrar that the payment was made "in full satisfaction of the plaintiff's alleged cause of action without prejudice to the defendant's defence to this action, and while denying

the plaintiff's cause of action." The registrar who received the sum and the memorandum sent a notice to the plaintiff in the prescribed form (1) informing him that the money had been paid in satisfaction, but gave the plaintiff no information as to the

(1) County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 82: "It shall be lawful for the defendant in any action brought under this Act within such time as shall be directed by the rules made for regulating the practice of the Court, to pay into court such sum of money as he shall think a full satisfaction for the demand of the plaintiff, together with the costs incurred by the plaintiff up to the time of such payment; and notice of such payment shall be communicated by the clerk of the court to the plaintiff by post, or by causing the same to be delivered at his usual place of abode or business; and the said sum of money shall be paid to the plaintiff; but if he shall elect to proceed, and if the plaintiff shall recover no further sum in the action than shall have been so paid into court, the plaintiff shall pay to the defendant the costs incurred by him in the said action after such payment; and such costs shall be settled by the Court, and an order shall thereupon be made by the Court for the payment of such costs by the plaintiff."

County Court Rules, 1886, Order IX., r. 11: "Where the defendant is desirous of paying money into court on an ordinary summons he shall, except where otherwise expressly provided, pay the same at least five clear days before the return day, and (except where money is paid into court under a defence of tender) with court fees proportionate to the amount paid in, and the solicitor's costs if any; and the registrar shall within twenty-four hours from the time of such payment send to the plaintiff notice thereof by post: Provided that, at any time before the return-day, the defendant may pay money into court with such costs as aforesaid, and the registrar shall give notice thereof to the plaintiff as aforesaid; but where money is so paid in less than five clear days before the return day or without costs, it shall be lawful for the judge to order the defendant to pay such fees and costs as the plaintiff shall properly have incurred for work done, and in attending the court, but no hearing fee shall be charged." Form 103 in the Appendix is of "notice of payment of part of claim into court" under r. 11. This was the form used by the registrar.

County Court Rules, 1886. Order IX., r. 12: "If the plaintiff elect to accept, in full satisfaction of his claim, including costs, such money as shall have been paid into court by the defendant and shall send to the registrar and to the defendant a written notice stating such acceptance within a reasonable time before the return day, the action shall abate and the plaintiff shall not be liable for any costs incurred by the defendant after receiving such notice. Form 104 in schedule is of "acceptance of sum paid into court" under r. 12.

Forms 103, 104, are the only forms in the appendix relating to Order IX., rr. 11, 12.

County Court Rules, 1886, Order LI., r. 27: "No practice shall prevail in any court except as provided by these rules, nor shall any matter be added to or taken from any form in the Appendix, whereby any obligation shall be imposed upon any suitor or any officer of the Court, to which he is not liable under statute or these rules."

1887

HARPER v. DAVIS.

other terms of the memorandum. The county court judge at the hearing treated the payment into court as an admission of liability, on the ground that the County Courts Acts and Rules contained no provision authorizing the payment of money into court with a denial of liability.

T. W. Chitty, for the defendant. Though the County Court Rules, 1886, contain no specific provision as to payment into court accompanied with denial of liability, the practice in the High Court under the Judicature Acts since the decision of the Court of Appeal in *Berdan* v. *Greenwood* (1) is a ground for so interpreting these rules as to extend the privilege of making such a payment into court to defendants in county courts. Apart, however, from this general question, the admission was clearly limited by the terms of the memorandum.

Hugo Young, for the plaintiff. Sect. 82 of the County Courts Act, 1846 (9 & 10 Vict. c. 95) which regulates payment into court in county courts impliedly prohibits payment into Court with denial of liability. The rules issued under s. 82, since the Judicature Acts, the County Court Rules, 1875, Order XII., rr. 4 & 5, and the County Court Rules, 1886, rr. 11 & 12, are framed on the assumption that it would have been ultra vires to introduce the new practice established in the High Court by *Berdan* v. *Greenwood* (1) into the county courts. The registrar was bound to administer the existing County Court Rules relating to payment into court, and under Order LI., r. 27, had no power to recognise any forms different from those in the Appendix. The only forms bearing on the subject are Forms 103 & 104, and they do not refer to denial of liability.

DAY, J. The appeal must be allowed. If conditional payment into court, reserving all rights, is not permitted by the practice of the county courts the registrar was bound to have returned this money to the appellant. There has been no admission of liability. On the more general question I express no opinion.

WILLS, J. The appeal must succeed as there has clearly been no admission of liability. But the question as to county court

(1) 3 Ex. D. 251.

practice is important. I certainly entertain the opinion that, apart from any notice to the registrar of the kind here given, the defendant in a county court action has the right which was defined by the Court of Appeal in *Berdan* v. *Greenwood*. (1) The existing County Court Rules (County Court Rules, 1886, Order IX., rr. 11, 12), seem to me to be framed in obvious conformity with the rules comprised in Order XXX., Rules of Supreme Court, 1875, on which *Berdan* v. *Greenwood* (1) was decided. They resemble these rules much more than they resemble those which were substituted in 1883. I think the county court judges by adhering to the text of the rules on which *Berdan* v. *Greenwood* (1) was decided have adopted the decision into their practice. The apparent want of machinery ought not, in my opinion, to defeat their intention, and in this case the defendant would have reserved his right to dispute his liability at the hearing, even though he had not given the registrar notice at the time of the payment into court.

Appeal allowed.

Solicitors for plaintiff: *East & Smith, Birmingham.*

Solicitor for defendant: *F. Needham, for R. A. Dale & Son, Birmingham.*

(1) 3 Ex. D. 251.

H. D. W.

1887
May 20.

[IN THE COURT OF APPEAL.]

EX PARTE OFFICIAL RECEIVER. IN RE REED, BOWEN & CO.

Bankruptcy—Appeal—Locus Standi—"Person aggrieved"—Official Receiver—Refusal of Application for Adjudication of Bankruptcy on non-approval of Scheme of Arrangement—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 104, 105, 109—*Bankruptcy Rules*, 1886, *r.* 191.

When an application made by the official receiver under s. 20 of the Bankruptcy Act, 1883, and rule 191 of the Bankruptcy Rules, 1886, for an immediate adjudication of bankruptcy against a debtor, on the non-approval of a scheme of arrangement, has been refused or adjourned, the official receiver is a "person aggrieved" by the order, and as such is entitled to appeal against it.

So *held*, by Lord Esher, M.R., and Lopes, L.J. (Fry, L.J., dissenting).

APPEAL by the official receiver against an order made by the registrar, adjourning, till July 1, 1887, the hearing of an application for an adjudication of bankruptcy against the debtors.

A receiving order having been made against the debtors on April 17, 1885, the creditors resolved to accept a scheme of arrangement proposed by the debtors, but the registrar refused to approve of the scheme, and his decision was affirmed by the Court of Appeal. (1)

A second scheme of arrangement was afterwards proposed by the debtors and was accepted by the creditors, but the registrar refused to approve of it, and an appeal from his decision was dismissed.

The Court of Appeal on that occasion also refused an application for leave to summon a fresh first meeting of the creditors with a view to the proposal of an amended scheme.

On April 29 the official receiver applied to the Court, under s. 20 of the Bankruptcy Act, 1883, and rule 191 of the Bankruptcy Rules, 1886, for an immediate adjudication of bankruptcy against the debtors, on the ground that a composition or scheme had not been approved in pursuance of the Act within fourteen days after the conclusion of the examination of the debtors, or such further time as the Court had allowed. The application was opposed by the debtors, and by a company, called the Railway

(1) 17 Q. B. D. 244.

1887

EX PARTE OFFICIAL RECEIVER.

IN RE REED, BOWEN & CO.

Construction Company, which had been formed for the purpose of taking over the contracts of the debtors, and at their request the registrar adjourned the hearing of the application.

The official receiver appealed.

Muir Mackenzie, (*Sir R. E. Webster, A.G.*, and *Sir E. Clarke, S.G.*, with him), for the appellant.

Finlay, Q.C., and *Sidney Woolf*, for the Railway Construction Company, and for some creditors. The official receiver is not a "person aggrieved" (1) by the registrar's order, and, therefore, he has no locus standi to appeal against it. The duties of the official receiver are defined by ss. 68, 69 and 70 of the Act. When he has brought the matter before the Court he has discharged his duty, and he has no further interest in it: *Ex parte Cooper*. (2)

Muir Mackenzie, for the appellant. Rule 191 authorizes the official receiver to make this application to the Court under s. 20, and it follows that he is entitled to appeal against the

(1) By s. 20 of the Bankruptcy Act, 1883, sub-s. 1: "Where a receiving order is made against a debtor, then, if the creditors at the first meeting, or any adjournment thereof, by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor, or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

By s. 104, sub-s. 2: "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:—

"(*b.*) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal."

By s. 105, sub-s. 2: "The Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose."

Sect. 109: "The Court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court may think just."

By rule 191 of the Bankruptcy Rules, 1886: "Where a receiving order has been made, and a quorum of creditors do not attend at the time and place appointed for the first meeting, or where the official receiver satisfies the Court that the debtor has absconded, or that the debtor does not intend to propose a composition or scheme, or in any of the other cases mentioned in the Act, the Court may, either on the application of a creditor or of the official receiver, forthwith adjudge the debtor bankrupt."

(2) 2 Ch. D. 255.

1887

EX PARTE OFFICIAL RECEIVER. IN RE REED, BOWEN & CO.

order made by the judge of first instance. He is an officer of the Court, but he is also an officer of the Board of Trade, and he acts under the direction of the Board. The term "person aggrieved" is not limited to a person who has a pecuniary grievance. The original application in the present case was made by the direction of the Board of Trade; the official receiver was a party to the litigation, and he is "aggrieved" by the refusal of his application: *Ex parte Leslie.* (1)

Herbert Reed, for the debtor.

Wilkinson, for a creditor.

Finlay, Q.C., in reply. The duty of the official receiver is only to bring the facts before the Court, and then the Court acts or not, mero motu, as it thinks fit. He has no further concern in the matter, and is not entitled to appeal. In *Ex parte Sidebotham* (2) James, L.J., intimated an opinion that the comptroller in bankruptcy could not appeal against the refusal of the Court to act on his report. Under the Bankruptcy Act, 1869, the comptroller occupied a position very similar to that of the official receiver under the Bankruptcy Act, 1883. The official receiver has sustained no injury by the refusal of his application: *Ex parte Ditton.* (3) *Ex parte Browne* (4) was a stronger case in favour of a right of appeal than the present case, and yet the Court held that a receiver was not entitled to appeal.

Muir Mackenzie, in reply as to the new cases cited. The position of the comptroller under the Act of 1869 was very different from that of the official receiver under the present Act. The duties which were imposed on the comptroller by r. 251 of the Bankruptcy Rules, 1870, are now transferred to the Board of Trade. The judgments in *Ex parte Sidebotham* (2) are really in favour of the right of appeal.

LORD ESHER, M.R. The question is whether the official receiver is entitled to appeal against such a refusal of such an order as was asked from the registrar, an order which, if the facts alleged were made out, the registrar was bound to make judicially, unless he was entitled for good reason to adjourn the hearing.

(1) 18 Q. B. D. 619.
(2) 14 Ch. D. 458.
(3) 11 Ch. D. 56.
(4) 16 Ch. D. 497.

By s. 20 it is enacted that "if a composition or scheme is not accepted or approved within fourteen days after the conclusion of the examination of the debtor, or such further time as the Court may allow, the Court shall" (not may) "adjudge the debtor bankrupt." If there is no sufficient reason for an adjournment, and if the facts mentioned in s. 20 are made out, the registrar would have no discretion, but would act wrongly in his judicial capacity if he did not forthwith adjudge the debtor a bankrupt.

Now who is the person who is to make, or who may make, an application for an adjudication under s. 20? Rule 191 provides that it may be made either by a creditor or by the official receiver. The official receiver, therefore, by that rule is a person who, in a matter which may be contested, is bound to ask the Court for a judicial decision against the debtor. Therefore, he, as it seems to me, is made a party to an application against the debtor for a judicial decision upon matters of fact which may be in contest, and I cannot doubt that he is bound to maintain the application by producing evidence and by arguing upon the effect of that evidence. Therefore he is placed in the position of a party to a litigation before a judicial tribunal.

Under such circumstances is he a person who is entitled to appeal against the decision? The only person who is entitled to appeal is a "person aggrieved" by the decision, and the question is whether, under the circumstances which I have stated, the official receiver can be said to be, within the meaning of s. 104, a "person aggrieved." In *Ex parte Sidebotham* (1), James, L.J., said (2): "A 'person aggrieved' must be a man who has suffered a legal grievance" (he does not say a pecuniary grievance, a grievance to his property or to his person; he says "a legal grievance"), "a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." It cannot mean wrongfully refusing him something, unless it be a refusal of something for which he had a right to ask, so that that definition of James, L.J., would mean "a 'person aggrieved' must be a man against whom a decision has been

(1) 14 Ch. D. 458. (2) 14 Ch. D. at p. 465.

1887

EX PARTE OFFICIAL RECEIVER. IN RE REED, BOWEN & CO.

Lord Esher, M.R.

pronounced which has wrongfully refused him something which he had a right to demand."

This is not an exhaustive definition, but it is an affirmative definition of a person who may appeal, and at all events it includes a person who has asked for a decision for which he had a right to ask, and has been wrongfully refused. And Bramwell, L.J., said (1): "But certainly the general rule is that an appeal must be by the party" (that means one of the parties to the dispute which is brought before the Court for its decision) "who has endeavoured to maintain the contrary of that which has taken place." That seems to me to be to the same effect as part of the definition of James, L.J., and it means that where there are two parties to the application—the one applying, the other asking that the application may be refused—one of them has endeavoured to maintain the contrary of that which has taken place, and, according to this definition, he is a party against whom a decision has been given, and, according to both definitions, he has a right to appeal, on the ground that he is legally a "person aggrieved" by the decision, being in the same position as a party to a litigation.

When you see that the official receiver is by rule 191 a person who is to make and to support this application, and who is bound to prove the grounds, affirmative and negative, on which the application ought to be granted, if he says that the facts have been wrongly decided against him, or that, the facts being decided in his favour, the Court has come to a wrong conclusion in refusing the application, it seems to me that he is, within the definitions given in *Ex parte Sidebotham* (2), a "person aggrieved."

I the more gladly find myself able to come to this conclusion, because, if the official receiver could not appeal in such a case, it would leave the matter open to that which I have from the first thought would be a great grievance under the Bankruptcy Act. This Act does not endeavour to deal simply between what the creditors, on the one side, choose to do, and what the bankrupt, on the other side, chooses to do. The legislature, seeing all the evils which have happened in bankruptcy, has insisted that the Court shall hold a tight hand over the creditors as well as the

(1) 14 Ch. D. at p. 466. (2) 14 Ch. D. 458.

debtor, and not allow the creditors, with their usual carelessness, when they think they have a bad debt, to defeat the intention of the legislature that debtors shall be compelled to conduct themselves properly; otherwise the result would be that, if the creditors agreed to some resolution, or if none of them would resist, the official receiver would not be able to interfere or ask the Court to say whether that which had been done was right.

I come to the conclusion upon the words of the Act, with the gloss put upon them in *Ex parte Sidebotham* (1), that the official receiver is a person who is entitled to appeal against such a refusal of such an order as was asked for in the present case.

FRY, L.J. I am sorry to say I cannot take the same view as the Master of the Rolls has taken.

The question is in some sense a simple one, but at the same time it is one of very considerable importance. The 104th section of the Act gives a right of appeal against orders in bankruptcy "at the instance of any person aggrieved." Those sections, which introduce to a considerable extent new machinery, giving to the official receiver powers not known before, are silent as regards any right of appeal in the official receiver.

Rule 191, which has been made under the authority of the Act, gives the official receiver the power of applying for an adjudication in the events and contingencies therein referred to. It appears to me that, in so applying to the Court for an adjudication, he is acting in an official capacity; that he is not really a litigant, but that he is an officer of the Court who is reminding the Court, so to speak, of the position of affairs in the particular bankruptcy, and I think it would be the duty of the Court to act upon the state of affairs so brought to its knowledge by him. I think that the official receiver ought to state the relevant facts fully and fairly to the Court, and, when he has done that, it appears to me that he has discharged the whole duty cast upon him by the 191st rule; he is then functus officio. If his application has succeeded, he has no further concern in the matter; if it has failed, he has equally no further concern in the matter. He has done his duty as a public servant, and the responsibility

(1) 14 Ch. D. 458.

1887

EX PARTE OFFICIAL RECEIVER. IN RE REED, BOWEN & Co. Fry, L.J.

rests with the Court which has heard his application. I cannot see that he is in any sense a "person aggrieved" by the refusal of his application. He is no more "aggrieved" than any other member of the public by an improper decision.

Now, how far is that conclusion consistent with *Ex parte Sidebotham* (1), which seems to me the only case which throws any light on the matter? James, L.J., said (2): "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

Has the official receiver in the present case "suffered a legal grievance"? Supposing the learned registrar to have gone wrong, it seems to me that the official receiver has suffered no grievance at all; he is an officer who has done his duty, and the Court has committed an error, but he is not in any way "aggrieved." Is he "a man against whom a decision has been pronounced which has wrongfully deprived him of something"? He is deprived of nothing by the decision. On the hypothesis which I am adopting, the order has wrongfully refused something, but that has not been a refusal to the official receiver; he has no more interest in it than any other member of the public, and therefore he is not within that definition. Is it a decision "which has wrongfully affected his title to something"? He is entitled to nothing. It seems to me, therefore, that, taking the words of James, L.J., the official receiver is not a "person aggrieved."

But it has been argued that the official receiver comes within the language used by Bramwell, L.J., who said (3): "Certainly the general rule is that an appeal must be by the party who has endeavoured to maintain the contrary of that which has taken place." The Lord Justice is there laying down a conditio sine quâ non; he is not stating what is sufficient to give a right of appeal. He says in effect that nobody can appeal except a person who has endeavoured to maintain the contrary of that which has taken place, but he does not say that every one who has maintained the contrary has a right to appeal. I cannot

(1) 14 Ch. D. 458. (2) 14 Ch. D. at p. 465.
(3) 14 Ch. D. at p. 466.

think that he would have extended that right to an officer whose duty was satisfied by his bringing the matter before the Court. This is the view which I take; but, as the Master of the Rolls and Lord Justice Lopes are against me, it is most probable that I am wrong.

LOPES, L.J. This is in one sense a simple case, but to my mind it raises an important question. The question is whether the official receiver is entitled under s. 104 to appeal in a case in which the registrar has refused to adjudge a person a bankrupt, when he was bound under s. 20 to do so unless there was a sufficient reason to the contrary?

Under rule 191 the official receiver is one of the persons who is authorized to make the application to adjudge the debtor a bankrupt.

In the present case the official receiver made that application to the registrar, and it was refused. Sect. 104 says that "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal." Is the official receiver in the circumstances of this case a "person aggrieved"? He has clearly made an application which he was entitled to make, and his case is that it has been wrongfully refused. In my opinion he is a "person aggrieved" within the meaning of s. 104, because he has been wrongfully refused that which he was entitled to ask.

It has been suggested by Fry, L.J., with whom I regret that I differ, that this case does not come within the definition of a "person aggrieved," contained in the judgment of James, L.J., in *Ex parte Sidebotham*. (1) I cannot think so. He said: "A 'person aggrieved' must be a man who has suffered a legal grievance." I am not at all prepared to say that a man, who has asked something which he is authorized and entitled to ask under the Act, has not, when his application is refused, "suffered a legal grievance." Then James, L.J., went on to say, "a man against whom a decision has been pronounced which has wrongfully deprived him of something." I think the official receiver has been "wrongfully deprived of something" here: he has been

(1) 14 Ch. D. at p. 465.

1887

EX PARTE OFFICIAL RECEIVER. IN RE REED, BOWEN & Co.

Lopes, L.J.

wrongfully deprived in not having an application granted which he was entitled to make. Then the Lord Justice continued: "or wrongfully refused him something, or wrongfully affected his title to something." I think the present case comes clearly within the definition there given.

I am glad that the majority of the Court are able to come to this conclusion, because it seems to me entirely in accordance with the policy of the Act of 1883, which, as has been often said, seeks to afford every protection to creditors, not only in the ordinary sense, but even against themselves.

The appeal was then heard on its merits, and in the result

THE COURT discharged the registrar's order, and made an immediate adjudication against the debtors.

Solicitor for appellant: *W. Murton, Solicitor to the Board of Trade.*

Solicitors for Railway Construction Company: *Foss & Ledsam.*

Solicitors for debtors: *G. S. & H. Brandon.*

Solicitors for a creditor: *Cuddon & Co.*

W. L. C.

June 13.

IN RE STAINTON. EX PARTE BOARD OF TRADE.

Bankruptcy—Appeal—Board of Trade—Order of Discharge—Validity of Rule—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), ss. 28, 127—*Bankruptcy Rules*, 1886, *r.* 237.

Rule 237 of the Bankruptcy Rules, 1886, which gives the Board of Trade a right to appeal from an order of discharge where the official receiver has reported facts which would justify the refusal of an unconditional discharge, is a rule for carrying into effect the objects of the Bankruptcy Act, 1883, within the meaning of s. 127, and is therefore valid.

APPEAL by the Board of Trade from an order for the unconditional discharge of the bankrupt granted by the judge of the County Court at Newcastle-upon-Tyne.

The official receiver had reported, under s. 28 of the Bankruptcy Act, 1883, that the bankrupt had continued to trade after knowing himself to be insolvent, and had brought on his bank-

1887

IN RE STAINTON. EX PARTE BOARD OF TRADE.

ruptcy by rash and hazardous speculations and unjustifiable extravagance in living.

Sect. 28 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides for the report of the official receiver as to the bankrupt's conduct and affairs, and the circumstances under which the bankrupt's discharge may be granted, refused, or suspended.

Sect. 127 (1): "The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act.

(2.) All general rules made under the fore-going provisions of this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act."

Bankruptcy Rules, 1886, r. 237: "An appeal . . . shall lie at the instance of the Board of Trade, and at the instance of the trustee (if any), from any order of the Court made upon such an application," (that is, an application for discharge, where the official receiver reports facts which would justify the refusal of an unconditional order of discharge).

Cooper Willis, Q.C., for the bankrupt. There is a preliminary objection to the hearing of the appeal. The Board of Trade has no right of appeal. Rule 237, which purports to give such right, is not a rule for carrying into effect the objects of the Bankruptcy Act, 1883, within the meaning of s. 127, and therefore, being inconsistent with the statute under which it purports to be made, is ultra vires and invalid: *Ex parte Davis, In re Davis* (1); *Reed* v. *Harvey* (2); *Ex parte Walker, In re McHenry* (3); *Ex parte Willey, In re Wright* (4); *Attorney-General for Quebec* v. *Reed.* (5)

If the rule is inconsistent with the Act, this defect is not remedied by the rule having been laid before Parliament in accordance with s. 127: *Ex parte Foreman, In re Hann* (6).

(1) Law Rep. 7 Ch. 526, at p. 529.
(2) 5 Q. B. D. 184, at p. 186.
(3) 22 Ch. D. 813, at p. 815.
(4) 23 Ch. D. 118, at p. 126.
(5) 10 App. Cas. 141.
(6) 18 Q. B. D. 393.

1887

IN RE STAINTON. EX PARTE BOARD OF TRADE.

The trustee has a right of appeal because he represents the creditors, but this does not apply to the Board of Trade.

No one can have a right of appeal except a "person aggrieved," within the meaning of s. 104 of the Bankruptcy Act, 1883, and s. 2 of the Bankruptcy Appeals Act, 1884 (47 & 48 Vict. c. 9), by which appeals from county courts sitting in bankruptcy are now regulated: *Ex parte Sidebotham, In re Sidebotham* (1); the Board of Trade is not a "person aggrieved."

He also referred to *Rex* v. *Inhabitants of Barham.* (2)

Muir-Mackenzie, (*Sir Richard Webster, A.G.*, with him), for the Board of Trade, was not called upon.

MATHEW, J. An objection is taken to the hearing of this appeal, on the ground that rule 237 of the Bankruptcy Rules, 1886, which gives an appeal at the instance of the Board of Trade in cases such as the present, is ultra vires and invalid. In order to determine whether this objection is well founded or not it is necessary to consider what power there is to frame rules. That power is given by s. 127 of the Bankruptcy Act, 1883, and what has to be determined here is whether the rule in question is or is not a rule for carrying into effect the objects of the Act, within the meaning of that section. It is contended on behalf of the bankrupt that the Board of Trade is not a "person aggrieved," within the meaning of s. 104 of the Act of 1883 and s. 2 of the Bankruptcy Appeals Act, 1884, and therefore cannot be entitled to appeal, but I am of opinion that we ought not to put such a narrow construction upon the Acts. It cannot be denied that the trustee is a "person aggrieved," and has a right of appeal in such cases as this. It is suggested that he has such right solely as representing the creditors. I think, however, that the trustee is given the right to appeal not merely as representing the creditors but also as representing the public. Rule 237 substitutes the Board of Trade for the trustee as appellant, and, instead of giving power to the Board of Trade to compel the trustee to enter and prosecute an appeal in cases where it is for the interest of the public that this should be done, gives power to the Board of Trade itself to appeal. I am of opinion that the rule

(1) 14 Ch. D. 458. (2) 8 B. & C. 99.

1887

IN RE STAINTON. EX PARTE BOARD OF TRADE.

is well adapted to carry into effect the objects of the Act, and therefore the rule is valid, and this appeal is properly brought.

CAVE, J. I am of the same opinion. The question whether a bankrupt is to obtain his discharge or not, is always one of public interest. This is shewn by the case of *Ex parte Selby, In re Selby.* (1) Knight Bruce, L.J., there said: "A certificate under the bankrupt laws is not a matter of right, but a matter of discretion—a discretion, I agree, to be exercised on judicial principles; but the case of a certificate is one in which those judicial principles involve the duty of attending to the public interest, and the claims of society, at least as much as in any other class of cases coming under the consideration of the Court. How I should have been disposed to deal with the case if only private interests had been concerned I need not say, for more than private interest is involved. The ground of opposition to the granting of the certificate is want of fidelity in a solicitor to his client—a relation which, as to obligation legally, morally, and equitably imposed, if we were to treat as lax—as liable to be broken lightly, and without more than slight penalties and trivial consequences—we should be incurring a heavier responsibility to society than any judicial person would willingly incur." Turner, L.J., said in the same case: "It was then urged that there had been a condonation—that Hodges had treated the matter as a mere question of debt; but it was new to hear it argued that when public interest was concerned any private dealing could amount to a condonation. The question was whether the bankrupt was to go into the world free to carry on business, without any liability to his former creditors; and in deciding this question the interests of society were to be looked to." If that was so under the Bankruptcy Act, 1849, which was then in force, it is still more the case under the Act of 1883. If it is right to regard the interest of society and commercial morality, means must be provided for bringing cases before the Court. The rule in question, therefore, has properly enacted that if those matters are not sufficiently considered the Board of Trade may appeal in order to bring the case before the Court. I am

(1) 2 Jur. (N.S.) 29.

1887

IN RE STAINTON. EX PARTE BOARD OF TRADE.

of opinion that the rule is not ultra vires, but is a rule for the purpose of carrying into effect the objects of the Bankruptcy Act.

The Court then heard the appeal on the merits, and came to the conclusion that the report of the official receiver was supported by the evidence, and ordered that the bankrupt's discharge be suspended for six months.

Appeal allowed.

Solicitor for the appellant: *The Solicitor to the Board of Trade.*

Solicitors for the bankrupt: *Hopwood & Sons*, for *R. Purvis*, South Shields.

P. B. H.

May 13, 20.

[IN THE COURT OF APPEAL.]

EX PARTE TODD. IN RE ASHCROFT.

Bankruptcy—Avoidance of Voluntary Settlement executed by Bankrupt—Retrospective Effect of Act—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 47, 169.

Sect. 47 of the Bankruptcy Act, 1883, which avoids certain voluntary settlements executed by a bankrupt, is not retrospective (i.e. does not apply to settlements executed before the Act came into operation) so far as its provisions differ from those of s. 91 of the Bankruptcy Act, 1869. Therefore it does not apply to a settlement executed by a non-trader before the Act came into operation, and the provision that a settlement executed within ten years before the bankruptcy of the settlor shall be void as against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the interest of the settlor in the settled property had passed to the trustees of the settlement on the execution thereof, does not apply to any settlements executed before the Act came into operation.

Per Lord Esher, M.R., and Lopes, L.J. Sect. 47 is retrospective so far as it is a re-enactment of s. 91 of the Bankruptcy Act, 1869.

Per Fry, L.J. Quære, whether s. 47 is retrospective at all.

In 1877 a trader executed a voluntary deed, which recited that he desired to settle certain shares in a company, upon the trusts therein declared for the benefit of his wife, himself, and his children, and that he was about to transfer the shares into the names of two persons therein named as trustees. And it was agreed that the trustees should stand possessed of the shares, so soon as the same should be transferred to them, upon trust to pay the dividends to the wife during her life, for her separate use without power of anticipation, and after her death upon certain trusts for the benefit of the settlor, and the issue of the marriage. The deed did not contain any covenant by the settlor to

1887

EX PARTE TODD. IN RE ASHCROFT.

transfer the shares to the trustees. At the date of the deed the shares were standing in his name. On its execution the certificates were handed over to the trustees, who shortly after gave notice of the deed to the company. The settlor continued to receive the dividends as he had done before, and applied them to his own use. In 1886 he transferred the shares into the names of the trustees, and was soon afterwards adjudicated a bankrupt:—

Held, by Lord Esher, M.R., and Lopes, L.J., that the deed of 1877, inasmuch as it imposed no legal obligation on the settlor with regard to the shares, was not a "settlement" within the meaning of s. 47.

But *held*, by all the Court, that the transfer of the shares to the trustees in 1886 was a "settlement" within s. 47, and that, being voluntary, and made after the Act came into operation, and within two years before the adjudication of bankruptcy, it was void as against the trustee in the bankruptcy.

Decision of Cave, J., affirmed.

APPEAL against an order made by Cave, J., declaring void as against the trustee in the bankruptcy of Peter Ashcroft a settlement which had been made by him of certain shares.

On April 27, 1877, a deed was executed, to which Ashcroft, his wife, and John Todd and G. W. Miller, were parties. This deed contained recitals to the effect that Ashcroft was absolutely entitled to certain furniture; to a vested reversionary interest in a sum of Consols, and a sum of India 4 per cent. stock (subject to the life interest of one William Perry); and to eighty shares in the Dutch Rhenish Railway Company; that he was desirous of irrevocably settling the whole of the property to which he was so entitled upon the trusts for the benefit of his wife, and himself, and his children, thereinafter declared, and was about to transfer the shares in the Dutch company into the names of Todd and Miller. And it was witnessed that, in consideration of his natural love and affection for his wife and children, Ashcroft did thereby assign to Todd and Miller the furniture, the Consols, and the India stock upon the trusts thereinafter declared. Certain trusts were declared of the furniture, and it was thereby further agreed that the trustees should stand possessed of the Consols and the India stock, and also of the shares in the Dutch company, so soon as the same should be transferred to them, upon trust to pay the dividends to the wife during her life, for her separate use without power of anticipation, and after her death upon certain trusts for the benefit of Ashcroft and the issue of the marriage. The deed did not contain any covenant by

1887

EX PARTE TODD. IN RE ASHCROFT.

Ashcroft to transfer the shares in the Dutch company to the trustees.

Ashcroft was a trader.

At the date of the deed the shares in the Dutch company were standing in Ashcroft's own name. On the execution of the deed the certificates of the shares were handed over by him to the trustees. On May 17, 1877, the trustees gave notice of the deed to the Dutch company, but no transfer of the shares into the names of the trustees was executed until February 19, 1886. Until that time Ashcroft continued to receive the dividends on the shares as he had done before the execution of the deed, and to apply them to his own use. On April 21, 1886, he filed a bankruptcy petition, and was, on April 30, adjudicated a bankrupt.

The trustee in the bankruptcy applied to the Court for an order declaring that he was entitled to the shares in the Dutch company, and directing Todd and Miller to transfer the same to him accordingly, on the ground that the bankrupt was insolvent at the time when he executed the settlement, and that his interest in the shares did not pass to the trustees of the deed on its execution.

March 4, 5, 1887. *Yate Lee*, for the trustee in the bankruptcy.

Winslow, Q.C., and *Sidney Woolf*, for the trustees of the deed.

Herbert Reed, for the bankrupt's wife.

E. E. Witt, for the bankrupt, as guardian ad litem of his infant children.

Cur. adv. vult.

April 6. CAVE, J. This is a motion on behalf of the trustee in the bankruptcy for a declaration that he is entitled to eighty shares in the Dutch Rhenish Railway Company, transferred by the bankrupt on February 19, 1886, to Todd and Miller, the trustees of a voluntary settlement executed by him on April 27, 1877; and for an order that the shares may be transferred to the applicant. [The learned judge stated the facts, and continued:—] It was first contended that the settlement was void under s. 47, on the ground that the settlor was insolvent at the time of making it. It has, however, been proved to my satisfaction that

1887

EX PARTE TODD. IN RE ASHCROFT.

Cave, J.

he was then able to pay all his debts without the aid of the property comprised in the settlement.

It was next urged that the settlement was void, because the interest of the settlor in the shares did not pass to the trustees of the settlement on the execution thereof. Mr. Winslow on the other side hardly ventured to suggest that the settlor's interest in the shares had passed to Todd & Miller on the execution of the deed. It did not in fact pass till February 19, 1886, nearly nine years afterwards, and the deed did not even contain a covenant to transfer the shares. It was, however, submitted that there was a complete declaration of trust, by which Ashcroft constituted himself a trustee of the shares on the trusts contained in the indenture. Numerous cases were cited, to which it is unnecessary to refer particularly. The law on the subject is free from doubt, and is well stated by Turner, L.J., in *Milroy* v. *Lord.* (1) He there says: "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and, if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of those modes must, as I understand the law of this Court, be resorted to; for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that, if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a

(1) 4 D. F. & J. 264, at p. 274.

1887

EX PARTE TODD. IN RE ASHCROFT.

Cave, J.

perfect trust." As Jessel, M.R., said in *Richards* v. *Delbridge* (1), to constitute a valid declaration of trust the owner must "so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee'; but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." Again, Hall, V.C., said in *Moore* v. *Moore* (2): "there seems to have been a notion that you may have a trust declared where the gift is imperfect, although the donor never meant to be a trustee at all—as, for instance, in the case of an imperfect gift to A. B., with a trust declared by A. B.—that, although A. B. does not become a trustee, because he has not the thing effectually transferred to him, you are to turn the gift into a trust and make the donor a trustee. That seems to me not to be consistent with the earlier and high authorities which have been cited in the course of the argument." Bearing these principles in mind, let us turn to the settlement, and ask whether it was the intention of the settlor to transfer the shares to Todd and Miller on the trusts therein declared, or to constitute himself a trustee? After reciting the desire of Ashcroft to settle the property, the deed recites that for the purpose of effectuating such desire he is about to transfer the shares into the names of Todd and Miller. Then there follows an actual assignment of the remainder of the property intended to be settled, and an agreement that Todd and Miller are to stand possessed of the shares, so soon as the same shall be transferred to them, upon the trusts therein declared. Can there be any doubt, if words have any meaning, that the settlor's intention was to transfer the shares to Todd and Miller on the trusts declared, and not to constitute himself a trustee. The notice to the railway company, which contains an incomplete statement by Ashcroft's solicitors of the effect of the deed, cannot carry the matter further. I cannot suppose that the settlor ever intended to constitute himself a trustee of the shares; and the nature of the trusts confirms this

(1) Law Rep. 18 Eq. 11, at p. 14. (2) Law Rep. 18 Eq. 483.

1887

EX PARTE TODD. IN RE ASHCROFT.

Cave, J.

view; for, after the decease of the wife, the trustees are to apply the dividends in the maintenance of Ashcroft and his children, in such manner as they shall in their uncontrolled discretion think proper.

Mr. Winslow raised a third point, viz., that s. 47 is not retrospective, that is to say, that it does not apply to a settlement executed before the coming into operation of the Act of 1883. That point, however, was decided the other way in *In re Player* (1), a decision to which I was a party, and which was founded on the decision of Bacon, V.C., in *Ex parte Dawson*. (2)

The order asked for must be made.

H. L. F.

The trustees of the settlement appealed.

1887. May 13. *Winslow, Q.C.*, and *Sidney Woolf*, for the appellants. The settlement was executed in 1877, before the Act of 1883 (which came into operation on January 1, 1884) was passed. Sect. 47 (3) is not retrospective, and does not apply to settle-

(1) 54 L. J. (Q.B.D.) 553.

(2) Law Rep. 19 Eq. 433.

(3) By s. 47 (1): "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, *and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.*"

(3.) "'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

[This section is in substance a re-enactment of s. 91 of the Bankruptcy Act, 1869, with this difference, that s. 91 applied only to traders, and that the words above printed in italics were not in s. 91.]

Sect. 169 (1): "The enactments described in the fifth schedule are hereby repealed as from the commencement of this Act to the extent mentioned in that schedule."

(2.) "The repeal effected by this Act shall not affect—

"(*a.*) Anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor

"(*b.*) Any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed."

1887.

EX PARTE TODD. IN RE ASHCROFT.

ments executed before the Act came into operation. At any rate, that part of the section (i.e., the final clause of it) which is new, is not retrospective. The parties to the deed could not have had such a provision in their contemplation at the time when it was executed, and it would be unjust that they should be affected by a provision with the requirements of which they could not possibly comply. In *In re Player* (1) it was, no doubt, held by a Divisional Court that the section is retrospective, but in that case the settlement in question would have been void under s. 91 of the Bankruptcy Act, 1869, and Mathew, J., expressed an opinion that "the later Act is in substitution for the earlier, and, except in so far as it varies the former, is retrospective." In *Ex parte Dawson* (2) it was held that s. 91 was retrospective, but the case was not argued by counsel, and the old authorities as to the retrospective effect of a statute were not referred to.

The ordinary rule is that a new statutory provision which affects rights is not retrospective, unless the intention that it shall be so is clearly expressed: *Surtees* v. *Ellison* (3); *Hewson* v. *Heard* (4); *Palmer* v. *Moore* (5); *Moon* v. *Durden* (6); *Ex parte Bailey* (7); *Young* v. *Hughes* (8); *Marsh* v. *Higgins* (9); *In re Joseph Suche & Co.* (10); Maxwell on the Interpretation of Statutes, 2nd ed., p. 257 et seq.

Sect. 169 is sufficient to preserve in existence the provisions of s. 91 of the Act of 1869, so far as regards settlements executed while that Act was in operation, so that there is no reason for holding s. 47 to be retrospective at all.

The effect of the notice given by the trustees to the railway company was to make the bankrupt himself a trustee of the shares for the purposes of the settlement.

Yate Lee, for the trustee in the bankruptcy. No "settlement" of the shares was made until the transfer to the trustees was executed in February, 1886. That was a voluntary "transfer of property," and therefore, by sub-s. 3 of s. 47, a "settlement," and

(1) 54 L. J. (Q.B.D.) 553.
(2) Law Rep. 19 Eq. 433.
(3) 9 B. & C. 750.
(4) Ibid. 754.
(5) Ibid. 754.
(6) 2 Ex. 22.
(7) Law Rep. 13 Eq. 314.
(8) 4 H. & N. 76.
(9) 9 C. B. 551.
(10) 1 Ch. D. 48.

it was made after the Act came into operation. The question, therefore, whether s. 47 is retrospective does not arise.

The deed of April, 1877, was not a "settlement" of the shares. It did not impose on the bankrupt any legal obligation to transfer the shares to the trustees; it contained nothing but a declaration of the trusts upon which they were to hold them when they should have been transferred to them. The bankrupt did not part with the legal interest in the shares, and he retained the beneficial interest. He continued after the execution of the deed to receive the dividends just as he had done before. He did not constitute himself a trustee of the shares: *Milroy* v. *Lord.* (1)

Ex parte Dawson (2) is an authority for holding s. 47 to be retrospective. There is no authority, except *In re Player* (3), for saying that a section can be in part retrospective and in part not retrospective. In *Ex parte Salaman* (4) it was held that s. 28 is retrospective, and that the Court could affix a condition to a bankrupt's order of discharge by reason of an offence which he had committed before the Act came into operation.

Winslow, Q.C., in reply, was called upon only on the question whether there was any "settlement" of the shares until the transfer to the trustees in February, 1886.

Sect. 47 contemplates that there may be a "settlement" of property by which the interest of the settlor in the property does not pass to the trustee on the execution thereof. Sub-s. 3 refers only to the mode in which property is transferred. It was meant to include such a thing as a gift of property by a father to a son, on condition that he should use it in a particular way, i.e., it was intended to defeat gifts on secret trusts. The deed of 1877 was in equity a valid declaration of trust of the shares, and it deprived the bankrupt of the power of dealing with them. The trustees could not have refused to accept the transfer of the shares.

Cur. adv. vult.

May 20. LORD ESHER, M.R. This case depends upon the true construction of s. 47 of the Bankruptcy Act, 1883, and the true view of the facts to which that section has to be applied. In

(1) 4 D. F. & J. 264.
(2) Law Rep. 19 Eq. 433.
(3) 54 L. J. (Q. B. D.) 553.
(4) 14 Q. B. D. 936.

1887

EX PARTE TODD. IN RE ASHCROFT.

Lord Esher, M.R.

1877 the bankrupt executed a document which purported to be a voluntary settlement of property on his wife and children. The Bankruptcy Act was passed in August, 1883, and it came into operation on January 1, 1884. On February 19, 1886, shortly before the adjudication of bankruptcy, the shares now in question, which were comprised in the document of 1877, were actually transferred by the bankrupt to the trustees. Then came the adjudication of bankruptcy, and the question is, whether those shares are to remain in the trustees of the settlement, or whether they have passed to the trustee in the bankruptcy in order that they may be distributed among the bankrupt's creditors. It was argued that the document of 1877 was a "settlement" within the meaning of s. 47, and that as regards these shares it is under that section void as against the trustee in the bankruptcy, because the interest of the settlor in the shares had not passed to the trustees of the settlement on the execution thereof. It was, therefore, an essential part of that argument to say that s. 47, that is, the whole of it, is retrospective in its operation, and applies to settlements executed before the commencement of the Act, though they may not be impeached as in any way dishonest. It may not be absolutely necessary that we should on the present occasion determine whether s. 47 is or is not retrospective; but the point has been brought before us, it is an important one and it has been fully argued, and it is right that we should express our opinion about it. Sect. 47 is to a great extent a repetition of s. 91 of the Bankruptcy Act, 1869, but a new provision is added at the end of it, viz., the clause which throws on the parties claiming under the settlement the onus of proving that the interest of the settlor in the property comprised in the settlement "had passed to the trustee of such settlement on the execution thereof." That clause is new. In *In re Player* (1) Mathew, J., expressed an opinion that so much of s. 47 as is identical with s. 91 of the former Act does apply to matters which happened before the Act came into operation, but that any part of it which is a new enactment is not retrospective. At first sight it seems to be a modification of the ordinary rule as to the retrospective effect of a statute to say that part of a section

(1) 54 L. J. (Q.B.D.) 553.

may be retrospective while the rest of it is not. It is a very important matter in the present case, because s. 47 applies to a new class of persons. It applies to non-traders as well as to traders, whereas s. 91 of the Act of 1869 applied only to traders. Is it a true principle for the construction of an Act of this nature, which deals with such a subject-matter, to say, that so much of it as is a copy of an Act which was in existence up to the date of its commencement applies to antecedent transactions, but that any new provision does not? As a general rule an Act of Parliament which affects rights is not retrospective, unless the intention of the legislature that it shall be retrospective is plainly expressed or implied. But, if that part of s. 47 which is old be not retrospective, what would be the result? The Act of 1869 is repealed, and a number of settlements to which it applied would be left untouched by reason of the repeal. In determining whether any provision of an Act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act—who had been doing that which the legislature thought to be wrong—should entirely escape the consequences of their wrongdoing by reason of the repeal of the old Act. I think, therefore, that, so far as s. 47 is a repetition of s. 91, the legislature obviously intended to replace the old enactment at once by the new one, and that, to that extent, s. 47 must apply to transactions which took place before the commencement of the new Act. But why should we carry it any further, and say that the new part of s. 47 applies to antecedent transactions? I can see no reason for doing so, and I think it is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new. If this be so, s. 47 cannot apply at all to any settlement executed by a non-trader before the commencement of the Act, nor can the final clause (which is a new enactment) apply to any settlement executed by a trader before the date.

1887

Ex parte Todd.
In re Ashcroft.

Lord Esher, M.R.

Therefore, this document, which was executed by the bankrupt in 1877, if it be a settlement within s. 47, is not invalidated by reason of its not complying with the final provision of s. 47.

But it was argued that the document of 1877 is not a "settlement" within the meaning of s. 47. I think it was intended to be a settlement. But what was the effect of it as regards these shares? It did not oblige the bankrupt to settle them at all. There was no covenant by him to settle them, and it was left free and open to him to settle them or not to settle them as he pleased, and there was no power in any Court to compel him to settle them. In my opinion such a document is not a settlement which is contemplated by the Act, and is not a settlement within s. 47.

But then comes the question whether the transfer of the shares to the trustees of the deed, which the bankrupt executed shortly before his bankruptcy, is a "settlement," as being a "transfer of property" within sub-s. 3 of s. 47? I do not intend to decide whether the transfer would have been a settlement, if the document of 1877 had been a settlement, though, if it had only carried out a previously executed binding settlement, I should have been inclined to think that there could not be two settlements of the same property. But in the present case there was no settlement executed before the commencement of the Act, and the transfer was executed after the commencement of the Act. In my opinion, the words of sub-s. 3 make it perfectly clear that the transfer is a "settlement" within the meaning of s. 47, and, if that be so, it is made void by that section, without any regard to the question whether it was executed with the view of defeating creditors, because it was executed after the commencement of the Act and within two years before the bankruptcy.

In my opinion the Act clearly applies to and makes void the transfer, which is the only settlement of the shares, and the question whether the Act is retrospective does not arise with regard to it. The judgment of Cave, J., must be affirmed.

Fry, L.J. I have arrived at the same conclusion, though by a somewhat different road. In 1877 the bankrupt, who was a trader, executed a deed, which has been called a post-nuptial

settlement, and which comprised the shares which are now in question. It contained a recital of the intention of the bankrupt to transfer the shares to the trustees, and there was nothing but a declaration that the trustees should, when the shares had been transferred to them, hold them upon certain specified trusts. After the execution of this deed the bankrupt continued to receive the dividends on the shares as he had done before, and, though certain notices were given by the trustees to the company, no transfer of the shares was executed. Then came the Bankruptcy Act, 1883, upon the construction of which the case turns, and which came into operation on January 1, 1884; and then, on February 19, 1886, the bankrupt executed a valid transfer of the shares to the trustees, and thereupon the trusts attached to the shares. On April 30, 1886, the bankruptcy occurred. Sect. 47 of the Act makes void (with certain exceptions) as against the trustee in a bankruptcy settlements which have been executed by the bankrupt, in two cases, the first of which is, "if the settlor becomes bankrupt within two years after the date of the settlement," and by sub-s. 3, "settlement," for the purposes of the section, includes "any transfer of property." It has not been contended that the settlement which is now in question falls within any of the exceptions. There was, therefore, a "transfer of property" executed by the bankrupt after the commencement of the Act, and within two years before the bankruptcy, and it was of such a character that, if it had not been executed, the shares would unquestionably have been the property of the bankrupt at the time of the bankruptcy, and the proceeds of them would have been distributable among his creditors. The transaction was, therefore, one plainly within the mischief of the Act, for property which would otherwise have been distributable among the bankrupt's creditors was taken away from them by means of an instrument voluntarily executed by him. And, in my opinion, the transaction is plainly within the words of s. 47, and I have no hesitation in coming to the conclusion that the transfer is void as against the trustee in bankruptcy.

It has been suggested that the transfer cannot be void, because the earlier instrument of 1877 was a "settlement" of the shares. I am inclined to agree with the Master of the Rolls that an

1887

Ex parte Todd. In re Ashcroft.

Fry, L.J.

instrument which neither transfers property, nor creates any obligation to transfer it, cannot be a "settlement" of the property within the meaning of the Act. It is not, however, necessary to decide this point, for I think that, even if the deed of 1877 was a "settlement," there is nothing to prevent the subsequent transfer of the shares from being also a "settlement," and being made void by s. 47.

This is sufficient to dispose of the present case. But, as the point has been fully argued, it is right that I should make some observations upon the second branch of s. 47, which makes void a voluntary settlement as against the trustee in the bankruptcy of the settlor, "if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement," unless the parties claiming under the settlement can prove two things, "that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement," and, "that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." I am clearly of opinion that s. 47 cannot be retrospective in toto, for I think that, when a statute, renders necessary to the validity of a transaction a condition with which it is impossible that the parties to the transaction should comply at the time when the statute comes into operation, the statute cannot apply to antecedent transactions, unless the legislature have plainly expressed their intention that it is to apply to them.

It would be most unjust that transactions should be avoided when the parties to them have had no opportunity of complying with the requirements of the legislature, and I can see no indication of an intention of the legislature in the present case to exclude the ordinary rule that a statute is not retrospective. Whether s. 47 is in any respect retrospective is a question which I think does not really arise. To say that a section of an Act is in part retrospective and in part not, strikes me as a somewhat novel mode of interpretation, and I am not sure that the preservation of the provisions of s. 91 of the Bankruptcy Act of 1869 with regard to settlements executed before it was repealed is not rather to be looked for in the saving clause, s. 169, of the Act of 1883. But on this point I desire to reserve my opinion.

Lopes, L.J. It has been urged that s. 47 is retrospective. It is perfectly true, as my Brother Fry has said, that it is not necessary to decide that question now, but I agree with the Master of the Rolls that, when a point of such importance and general application has been brought before the Court and fully discussed, it is our duty to express our opinion about it. Sect. 47 is very similar to s. 91 of the Bankruptcy Act, 1869, but s. 91 was restricted to traders, and the final clause of s. 47 was not in s. 91. That clause was introduced for the first time in s. 47. In every other respect, I think, s. 47 is a reproduction of s. 91. I am of opinion that so far as s. 47 is a re-enactment of s. 91 (that is in the case of traders) it is retrospective, and I cannot think that the legislature could have had any other intention. Otherwise, this result would follow, that a voluntary settlement executed by a trader while the Act of 1869 was in operation, and which would, in the event of his becoming bankrupt within two years after its execution, have been void if that Act had continued in force, could not be set aside, if the two years did not expire till after the Act of 1883 came into operation. A very similar question arose in *Ex parte Dawson* (1) with regard to the retrospective effect of s. 91, and then it was held by Bacon, C.J., that s. 91 applied to a settlement executed before the Act of 1869 came into operation. In my opinion, therefore, if the document of 1877 was a settlement of the shares, it is not within s. 47, because the latter clause of that section is not retrospective. But, the document of 1877 was not a settlement of the shares, for it created no binding legal obligation on the part of the bankrupt in respect of them.

Was, then, the transfer of the shares to the trustees, which was executed in 1886, after the Act of 1883 had come into operation, a settlement within s. 47? I think it was clearly within the mischief of the Act, and that sub-s. 3 of s. 47 brings it within the words. In my opinion the transfer was a voluntary settlement within s. 47, and it is void under that section as against the trustee in the bankruptcy. The decision of Cave, J., was right, and the appeal must be dismissed.

(1) Law Rep. 19 Eq. 433.

1887

EX PARTE TODD.
IN RE ASHCROFT.

Winslow, Q.C. The trustees ought not to be ordered to pay costs. It was their duty to protect the beneficiaries.

LORD ESHER, M.R. They need not have appealed.

The appeal will be dismissed with costs.

Solicitors for appellants: *Munns & Longden.*

Solicitors for trustee in the bankruptcy: *Bedford, Monier-Williams, & Robinson.*

W. L. C.

May 12.

[IN THE COURT OF APPEAL.]

GAPP *v.* BOND.

Bill of Sale—Ship or Vessel—Dumb Barge—Assignment—Registration as Bill of Sale—Bills of Sale Act, 1878 *and* 1882 (41 *&* 42 *Vict. c.* 31), *s.* 4, *and* (45 *&* 46 *Vict. c.* 43), *s.* 3.

A dumb barge, propelled by oars, plying on the River Thames and carrying goods, wares, and merchandize (without passengers) is a vessel within the exception of the Bills of Sale Acts, 1878 and 1882, which excepts from registration as a bill of sale transfers or assignments of a ship or vessel or any share thereof.

APPEAL from the judgment of Mathew, J., on the trial without a jury of an interpleader issue.

Certain barges seized by the sheriff of Surrey were claimed by the plaintiff as his property. The barges were what is known as dumb barges, plying on the River Thames and carrying goods, wares, and merchandize (without passengers), and after the transaction by which according to the plaintiff they were sold to him, they were registered in his name in the books of the Company of Watermen and Lightermen of the River Thames under the provisions of the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.). The first question at the trial was whether the transaction which according to the plaintiff made the barges his property was in fact a sale or only a mortgage.

The learned judge decided that it was a mortgage, and that the documents that passed constituted a bill of sale that required to be registered, and that the exception of "transfers or assignments of any ship or vessel or any share thereof," in s. 4 of the Bills of Sale Act, 1878, did not apply, on the ground that it did

not take effect except in cases of such transfers or assignments as were rendered public by other enactments.

Judgment was, therefore, given for the defendant.

The plaintiff appealed.

Kemp, Q.C., and *Wheeler, Q.C.*, for the plaintiff, after dealing with the question whether there was a sale or mortgage to the plaintiff, argued that a dumb barge was a vessel within the exception in the Bills of Sale Act, 1878, and cited *The Mac* (1) and the definition of a ship in the Merchant Shipping Act.

Charles, Q.C., and *Herbert Reed*, contended that the transaction was a mortgage and that the documents required registration, and that a barge propelled only by oars was not a vessel so as to come within the exception in the Bills of Sale Act, 1878.

Wheeler, Q.C., in reply, cited *Union Bank of London* v. *Lenanton*. (2)

LORD ESHER, M.R. I think we are bound in this case to give judgment according to an authority which if it was cited to Mathew, J., was so in such a way that his attention does not appear to have been directed to it. I think the learned judge was right in his view of the transaction, and that it amounted to a mortgage and not to a sale. The documents by which it was carried out would therefore, but for the exception in s. 4, require to be registered under the Bills of Sale Act, 1878. Under that exception a transfer of a ship or vessel, or any share thereof, does not require to be registered. I confess that, not being aware that the point had been before this Court already, I was inclined to give way to the argument that the exception was applicable only to such ships as would be registered elsewhere. But that view is met by the judgment of the Court of Appeal in *Union Bank of London* v. *Lenanton* (2), in which Lord Bramwell, with his usual terseness, said: "We are asked to read the enactment in the Bills of Sale Act as though it had in it the words 'transfer or assignment of a ship pursuant to the Merchant Shipping Act.' I am of opinion that we cannot so read it. It is difficult to say why we cannot, except to say that no reason has been given why we should." The words being so general, I fail to see any limit

(1) Law Rep. 7 P. D. 126. (2) 3 C. P. D. 243.

1887

GAPP v. BOND.

except the ordinary meaning of the words used. The word "ship" does not mean what in shipbuilding is technically called a ship, for that would confine it to a vessel of a particular rig; but the expression must include whatever in popular language is called a ship. The word "vessel" occurs also, and unless we are prepared to say that this is mere tautology, and I see nothing to help us to say so in this case, that goes further than ship, and brings into the exception anything that in popular language is called a vessel. Nobody would call a raft or a Thames wherry a vessel, but anything beyond a mere boat is, to my mind, ordinarily called a vessel, and is brought within the exception. I do not see why the exception was made so large, but I cannot say we can limit it to something less than is conveyed by the words as used in ordinary language. The authority of the decision in this Court prevents us from limiting the word "vessel" to anything short of what is ordinarily known as a vessel. Under these circumstances I think the case was not within the Bills of Sale Act at all.

Therefore I think in the result the appeal must be allowed. I say again I do not consider that we are overruling Mathew, J., for I am perfectly certain that this case, as an authority binding him, was never really brought to his knowledge.

FRY, L.J. Two questions arise on this case. The first is whether any of the documents which exist in this case are of a kind that require registration under the Bills of Sale Acts, 1878 and 1882. The moment the real facts are ascertained there is in my mind no doubt that the transaction was by way of mortgage and created a security, and that this was carried out by an instrument which would require registration as a bill of sale. The Act of 1878, however, contains an exception that the words "bill of sale" shall not include transfers or assignments of any ship or vessel or any share thereof. Is a dumb barge within this exception? A ship it clearly is not, but it appears to me to be a vessel. Therefore, unless we can import into the Act some narrower construction than the natural use of the language suggests, the transaction is within the exception. It was pressed upon us that the true meaning of the exception was to except from the Bills of Sale Acts any transaction which required regis-

tration under the Merchant Shipping Act, and that we ought to read "transfer or assignment of any ship or vessel or any share thereof" as transfer or assignment requiring registration under the Merchant Shipping Act, but that argument is at variance with the case of *Union Bank of London* v. *Lenanton* (1), by which we are bound. The appeal must therefore be allowed.

LOPES, L.J. The question in this case is whether the transaction is within the Bills of Sale Act or not. The question which was fought in the court below and here was whether the true nature of this transaction was a loan or a hiring agreement; if the former, coming within the Bills of Sale Act; if the latter, not within the Act. But it is now unnecessary to consider that question because, in my opinion, the transaction in question comes within the exception contained in s. 4 of the Act of 1878. That section says, after defining what a bill of sale shall include, that it shall not include certain documents, and amongst them transfers or assignments of any ship or vessel, or any part thereof. Now it was argued and urged upon the Court that what was meant there was a ship or vessel requiring registration under the Merchant Shipping Act. I am bound to say that for a long time I thought there was great force in that argument. But it appears on the authority of the case of *Union Bank of London* v. *Lenanton* (1) that the point has been decided. I adopt the words of Lord Bramwell in his judgment, where he says "It is said that the words used are similar to those used in the Merchant Shipping Act. That is true, but the words in the Bills of Sale Act are general words, and such as a person would use who intended to frame a wide and comprehensive enactment." It is clear, therefore, that we are not to put upon the words the limited meaning which might be put on them if we were to refer to the Merchant Shipping Act. If that is so, the only remaining question is, whether a barge is a vessel. Now it appears to me to be scarcely arguable that a barge is not a vessel. I think the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Woodbridge & Sons.*

Solicitor for defendant: *J. Wheatley.*

(1) 3 C. P. D. 243.

A. M.

1887
June 14.

[IN THE COURT OF APPEAL.]

CALVERT *v.* THOMAS AND ANOTHER.

Bill of Sale—Statutory Form—Power of Sale—Power to charge Expenses on Proceeds of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19–21.

A bill of sale, which contained an express power of seizure and sale, provided that the mortgagee should out of the moneys to arise from any such sale as aforesaid in the first place pay "the expenses attending such sale or otherwise incurred in relation to this security":—

Held, that the bill of sale was void as not being in conformity with the statutory form given by the Bills of Sale Act, 1882.

The provisions of the Conveyancing Act, 1881, with regard to power of sale are not incorporated by the statutory form given by the Bills of Sale Act, 1882.

Ex parte Official Receiver, In re Morritt (18 Q. B. D. 222), and *Watkins* v. *Evans* (18 Q. B. D. 386), discussed.

APPEAL from the judgment of A. L. Smith, J., at the trial of an interpleader issue.

The facts were as follows: the plaintiff claimed certain goods, which had been taken in execution, under a bill of sale, the defendants being the execution creditors. By the bill of sale, which was dated June 1, 1886, the fixtures, plant, chattels, and things in or about certain premises, and specified in a schedule, were assigned to the mortgagee as security for the repayment of a sum of 300*l.* as therein mentioned. The bill of sale contained a covenant by the mortgagor to permit the mortgagee at all reasonable times to enter into the said premises for the purpose of inspecting the said chattels and things; and it gave a power of seizure and of sale after the expiration of five days, if default should be made in payment of the money at the time specified, or if any other default or event mentioned as a cause of seizure in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, should be made or happen: and it was declared "that the mortgagee should with and out of the moneys to arise from any such sale as aforesaid in the first place pay the expenses attending such sale or otherwise incurred in relation to this security, and in the next place pay the moneys which should still be owing on

the security and should pay the surplus, if any, to the mortgagor." The learned judge held that the provision with regard to payment of expenses out of the proceeds of a sale was too wide and rendered the bill of sale void as not being in conformity with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; and he therefore gave judgment for the defendants.

Potter, Q.C., and *Danckwerts*, for the plaintiff. The provision as to payment of expenses out of the proceeds of a sale does not really constitute any substantial deviation from the statutory form. If there were no express provision as to seizure and sale in the bill of sale, the provisions of ss. 19-21 of the Conveyancing Act, 1881, would apply, according to the view of the majority of this Court in *Ex parte Official Receiver, In re Morritt* (1), as explained in *Watkins* v. *Evans*. (2) The express provision as to proceeds of a sale inserted in this bill of sale is, if reasonably construed, practically identical with that of s. 21, sub-s. 3, of the Conveyancing Act, 1881, which provides that the money received by the mortgagee arising from the sale shall be held by him in trust to be applied by him "first in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale or otherwise." The express provision in this bill of sale, reasonably construed with reference to the general scope of the provision, does not go any further than that of the Conveyancing Act, which in the absence of express provision would have been incorporated in the bill of sale. The provision must be read as confined to expenses properly incurred by the mortgagee.

They also cited *Lumley* v. *Simmons* (3); *Consolidated Credit Corporation* v. *Gosney* (4); *In re Cleaver* (5); *Furber* v. *Cobb* (6).

Herbert Reed, for the defendants. This clause as to paying expenses out of proceeds of a sale avoids the bill of sale according to the principle laid down in *Ex parte Stanford, In re Barber* (7), first, because it produces a different legal effect from that which

(1) 18 Q. B. D. 222.
(2) 18 Q. B. D. 386.
(3) 55 L. J. (Ch.) 759.
(4) 16 Q. B. D. 24.
(5) 18 Q. B. D. 489.
(6) 18 Q. B. D. 494.
(7) 17 Q. B. D. 259.

1887

CALVERT v. THOMAS.

the bill of sale would have had if drawn precisely in the statutory form; and, secondly, because it renders the document a puzzle, and calculated to mislead the borrower. Taking the second ground first, it is impossible to say definitely what expenses would come within this clause. Taken according to their literal signification the words would cover any expenses whatever which had any relation to the security, even expenses incurred before its execution. There is a power to inspect the goods. An ingenious money lender might charge for the expenses of sending a man down every day to inspect the goods. This is not a provision for the defeasance or maintenance of the security: *Blaiberg* v. *Beckett*. (1)

[He was then stopped.]

LORD ESHER, M.R. With regard to one point which has been argued, I desire once more to express my opinion, which has always been the same, that the provisions of the Conveyancing Act, 1881, as to the power of sale are not in any case incorporated in the form given by the Bills of Sale Act (1878) Amendment Act, 1882. I think that that form is wholly inconsistent with the idea that the provisions of the Conveyancing Act, 1881, are incorporated. I have given the reasons for this opinion before, and I still adhere to them. I do not think that the majority of the Court in the case of *Ex parte Official Receiver, In re Morritt* (2), expressed any opinion to the contrary. I have a strong opinion that the effect of what was said by all the judges in that case, except Fry, L.J., is that the provisions of the Conveyancing Act are not in any case incorporated by the form in the schedule to the Act of 1882. Therefore I think that the expressions used by Fry, L.J., on behalf of Bowen, L.J., and himself, in delivering the judgment in *Watkins* v. *Evans* (3), if they are to be taken as intimating a contrary view, and stating that the majority of the Court in the case of *Ex parte Official Receiver, In re Morritt*, (2) held that the Conveyancing Act applied, must have proceeded from a misapprehension as to the effect of that judgment. There is nothing actually decided by the case of *Watkins* v. *Evans* (3) which makes

(1) 18 Q. B. D. 96. (2) 18 Q. B. D. 222.
(3) 18 Q. B. D. 386.

it any authority as to the effect of the decision in the case of *Ex parte Official Receiver, In re Morritt* (1), for in either point of view the decision in *Watkins* v. *Evans* (2) must have been what it was. I almost doubt whether my brother Fry could have intended to go so far as the words seem to imply, but, be that as it may, if if he did, I think there must have been some misapprehension on his part as to the effect of what the majority said in *Ex parte Official Receiver, In re Morritt.* (1) Proceeding therefore on the footing that no part of the Conveyancing Act, 1881, is incorporated in a bill of sale in the statutory form, the question is whether this bill of sale sins against that form. I think that it does, because it gives to the mortgagee a larger right than he would have had if the form had been followed. I think the clause in the bill of sale with regard to the payment of expenses out of the proceeds of the sale would include expenses incurred before the execution of the bill of sale, if those expenses related to the question what the security should be. The clause is so large that I think it would give the utmost possible latitude to the mortgagee to retain an indefinite amount for expenses, provided they related in any way to the security, before any balance would become payable to the mortgagor. The rights so given to the mortgagee are, in my opinion, much larger than he would have been entitled to, if the form had been substantially followed; and it seems to me that such a provision is not authorized by the Act of 1882. For these reasons I think that the bill of sale was bad, and this appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. It is conceded that, having regard to the decision in *Ex parte Official Receiver, In re Morritt* (1), the provisions of the Conveyancing Act, 1881, are not incorporated in this bill of sale. I must say I am rather surprised at finding myself, in the case of *Watkins* v. *Evans* (2), supposed to have expressed an opinion that the provisions of the Conveyancing Act, 1881, as to the power of sale, apply to the statutory form given by the Bills of Sale Act (1878) Amendment Act, 1882, unless some provision is introduced into the bill of sale which renders them unnecessary. I clearly remember

(1) 18 Q. B. D. 222 (2) 18 Q. B. D. 386.

1887

CALVERT v. THOMAS.

Lindley, L.J.

that in *Ex parte Official Receiver, In re Morritt* (1), my view was that the provisions of the Conveyancing Act applied to bills of sale till the passing of the Act of 1882, but not that they applied to bills of sale in the form in the schedule to the Act of 1882, in which respect I differed from my brother Fry; and I think there must have been some misapprehension when I was supposed to have said otherwise. I am of opinion that it would be inconsistent with the form in the schedule to the Act of 1882, to hold that the provisions of the Conveyancing Act are incorporated thereby. Having dealt with that matter, I will proceed to consider the bill of sale now before us. It is said not to be in conformity with the statutory form, because it confers on the bill of sale holder certain rights and powers which he would not have had under the form. That argument depends on the clause with regard to payment of expenses out of the proceeds of a sale. The words which enable the mortgagee to retain or pay out of the proceeds of the sale the amount of any expenses incurred in relation to the security appear to me to confer a power much too wide to be in accordance with the form. It may be admitted that the clause would cover expenses properly incurred, but the question is whether it would not go a great deal further. The counsel for the defendants has pointed out some opportunities which it might give the mortgagee of saddling the mortgagor with oppressive charges. It seemed to me that there was no answer to his suggestion that under it oppressive charges in respect of the expenses of the frequent inspection of the goods might be made; and also that it would include charges in respect of the preparation of the security. There would be thus an opportunity afforded to the mortgagee under it to saddle the mortgagor with unknown and oppressive charges, such as it was precisely the object of the Act to prevent.

LOPES, L.J. In the case of *Ex parte Official Receiver, In re Morritt* (1), I thought that the provision of the Act of 1882, by which a statutory form was given, was inconsistent with the incorporation of the provisions of the Conveyancing Act, 1881, and I can only say that I am still of the same opinion. Speaking for

(1) 18 Q. B. D. 222.

myself, I certainly thought that view was entertained by all the judges who decided *Ex parte Official Receiver, In re Morritt* (1), except Fry, L.J., and it is with some surprise that I find the view of the judges in that case stated to have been what is expressed in *Watkins* v. *Evans.* (2) It seems that in delivering the judgment of himself and Bowen, L.J., in that case, Fry, L.J., said that the majority of the Court in the former case thought that the power of sale contained in the Conveyancing Act, 1881, was incorporated in the statutory form given by the Act of 1882, unless it was rendered unnecessary by special provision. That is not my view of the effect of what was said by the majority in *Ex parte Official Receiver, In re Morritt.* (1)

Passing from that point and coming to this bill of sale, it is said that it is bad by reason of the clause with regard to charging expenses on the proceeds of a sale, because that clause sins against the scheduled form. I think that point is a good one. I think that the insertion of that provision makes the legal effect different from that of a bill of sale in compliance with the form. The provision is too large, for it would include, I think, expenses incurred before the execution of the bill of sale, if they related in any way to the security: and I think the insertion of so indefinite a provision would be calculated to mislead the borrower. For these reasons the case appears to me to come within the decision in *Ex parte Stanford, In re Barber.* (3)

Appeal dismissed.

Solicitors for plaintiff: *Gregory & Co., for Robert Nicholson.*
Solicitor for defendants: *H. Davis.*

(1) 18 Q. B. D. 222. (2) 18 Q. B. D. 386.
(3) 17 Q. B. D. 259.

E. L.

1887

May 12.

EDER *v.* LEVY.

Mayor's Court, London—Appeal to High Court—Claim over 20l.—Practice—Leave to appeal—Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 8—*Judicature Acts, Order LIX., r.* 10.

By the Mayor's Court of London Procedure Act, 1857, s. 8, an appeal from the Mayor's Court to the superior Courts is given where the sum sought to be recovered exceeds 20*l.*, and by s. 9 such appeal is to be by special case. By s. 10 the parties in any case in the Mayor's Court may, if the judge grants leave, move in the superior Courts to set aside the verdict :—

Held, that Order LIX., r. 10, which provides that all appeals from inferior Courts shall be by notice of motion, does not make it necessary where the sum sought to be recovered in the Mayor's Court exceeds 20*l.*, and a motion to set aside the verdict and judgment on the ground of misdirection is made in the High Court, that the leave of the judge of the Mayor's Court should be obtained.

MOTION on appeal from the Mayor's Court to set aside a verdict and judgment for the defendant, and enter judgment for the plaintiff for 60*l.* and costs, or for a new trial upon the ground of misdirection. The judgment was obtained in the Mayor's Court on January 18, 1887. No leave to appeal by the judge of that Court was given. Notice of the motion had been served.

D'Eyncourt, for the defendant, objected that leave to appeal was necessary under the Mayor's Court Act, 20 & 21 Vict. c. clvii., and no leave had been given by the Mayor's Court. (1)

A. Channell, Q.C., and *Munroe*, for the plaintiff. The sum

(1) By 20 & 21 Vict. c. clvii. (the Mayor's Court of London Procedure Act, 1857), s. 8, if a party to a cause in which the sum sought to be recovered shall exceed 20*l.* shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any one of the superior Courts. . . . . By s. 9 such appeal shall be in the form of a case.

By s. 10, if upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move in any of the superior Courts to set aside a verdict or a nonsuit, or to enter a verdict for the plaintiff or defendant, or to enter a nonsuit, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court . . . . for a rule to shew cause why such verdict or nonsuit should not be set aside and a verdict entered for the plaintiff or defendant, or a nonsuit entered, or why a new trial should not be had. . . . .

sought to be recovered in this action exceeds 20*l.*, therefore by 20 & 21 Vict. c. clvii. s. 8, either party may appeal on a point of law without leave. Such appeal was formerly by special case, agreed on by both parties; and if they could not agree the judge of the Court must settle and sign it: s. 9. There is, under s. 10 also, an appeal with leave in all cases. That appeal was by motion for a rule. A power to make rules, which was given by s. 17 of the Judicature Act, 1875, having been declared by s. 24 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 23, to include the power to make rules for regulating the procedure on appeals from inferior Courts, such rules were made in December, 1885; and by Order LIX. every appeal to the Queen's Bench Division from inferior Courts of record of civil jurisdiction in all proceedings other than proceedings in bankruptcy (rule 9), "shall be by notice of motion, and no rule nisi or order to shew cause shall be necessary:" rule 10. The Mayor's Court is an inferior Court of record of civil jurisdiction. The right of appeal without leave in cases over 20*l.*, given by the Mayor's Court Act, remains; the procedure in such appeals is, however, altered, and instead of appealing by special case the appeal must be by motion. The appeal by special case from the county court under 13 & 14 Vict. c. 61, ss. 14, 15, must now be by motion, notwithstanding that Act: *Reg.* v. *Kettle.* (1) The leave of the Mayor's Court is no doubt still necessary for appeals under s. 10 of 20 & 21 Vict. c. clvii. (the Mayor's Court Act, 1857), but never was and is not now necessary for an appeal on a point of law in a case above 20*l.*, which formerly was by special case, and now must be by motion; the notice of motion under the Rules is not the same as the motion for a rule nisi in s. 10 of the Mayor's Court Act.

It could not have been intended to take away the right of appeal without leave in all cases above 20*l.*

D'Eyncourt, for the defendant. The Rules were framed to render the practice on appeal from the inferior Courts uniform. Order LIX., rule 10, imperatively enacts that "every such appeal shall be by notice of motion." The notice of motion here is to set aside the verdict, and enter judgment for the defendant.

(1) 17 Q. B. D. 761.

1887

EDER v. LEVY.

Therefore the appeal is within the terms of s. 10 of the Mayor's Court Act, and leave is a condition precedent.

LORD COLERIDGE, C.J. I am of opinion the true view is that the Judicature Act of 1884 (47 & 48 Vict. c. 61), and the Rules since made, have materially altered the form of procedure under ss. 8 & 9, leaving the right of appeal as it was before, and that, as leave was not required before, it is not required now.

A. L. SMITH, J. I am of the same opinion. The result of the contention by the learned counsel for the defendant could be that suitors for a sum above 20*l.* in the Mayor's Court could not come to this Court on appeal without leave. Before the Rules of 1884 the procedure as to appeal from the Mayor's Court was that in cases over 20*l.* the party could appeal to this Court on a matter of law as of right by ss. 8 & 9, but by special case. By s. 10 a party in a case over 20*l.* or under 20*l.* might appeal to this Court, not only on a matter of law, but also to enter a verdict or set aside a non-suit. But he could not get into this court under s. 10 without leave of the judge of the Mayor's Court. Then came the Act of 1884 and the rules made under it. There was an appeal on a matter of law in a case over 20*l.* without leave. The question is, does the rule enabling a party to come to this court on notice of motion take away that vested right of appeal? In my opinion it does not. The effect of the rule is that, whereas before the rule the party had a right of appeal in cases over 20*l.* by special case without leave, he now comes by notice of motion, and whereas under s. 10 he had a right to come, with leave, by a rule to shew cause, he now must come by notice of motion. I think the right of appeal is unchanged.

Appeal heard.

Solicitor for plaintiff: *Hubbard.*
Solicitor for defendant: *G. E. Lewis.*

J. R.

[CROWN CASE RESERVED.]

1887
June 18.

THE QUEEN *v.* LLOYD.

Criminal Law—Perjury—Examination before a Court of Bankruptcy—Necessity for the presence of the Judge or Registrar during the Examination—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27, *sub-ss.* 1, 2, 3, 4, 5—*Bankruptcy Rules*, 1886, *rr.* 66, 88.

The prisoner was convicted of perjury alleged to have been committed in an examination by "the Court" under s. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under s. 27 before a county court having jurisdiction in bankruptcy. The oath was administered to the prisoner in court by the registrar. The registrar remained in court. The examination of the prisoner in the course of which the answers in question were given, took place in a room used for examinations, in the absence of the registrar:—

Held, that there had been no valid examination by "the Court" within s. 27, and that the conviction must be quashed.

CASE reserved by Day, J., for the consideration of the Court of Crown Cases Reserved, of which the facts were in substance as follows:—

The prisoner was convicted on May 21, 1887, at the Liverpool Assizes upon an indictment charging him with perjury alleged to have been committed in the course of his examination as a witness in a bankruptcy proceeding under s. 27 of the Bankruptcy Act, 1883. Evidence was given that the prisoner was duly summoned under s. 27 of the Bankruptcy Act, 1883, for examination at the Liverpool County Court, and attended before one of the registrars. He was duly sworn in court by the registrar. At the same time a duly appointed shorthand writer of the Court made the usual declaration before the registrar. The prisoner and the shorthand writer then left the court, in which the registrar continued sitting, and went to a room called the witness examination room. The prisoner was in this room examined by the solicitor to the official receiver in the presence of his own solicitor. The registrar was not present in the witness examination room or within hearing at the time when the answers were given upon which the perjury was assigned, but it was stated that he would have come if required.

At the close of the case for the prosecution, counsel for the

1887

THE QUEEN v. LLOYD.

prisoner contended that it had been shewn that the answers of the prisoner upon which perjury was assigned were given in the absence of the registrar from the room in which the examination was conducted, and that the alleged perjury had not taken place before a Court properly constituted or of competent jurisdiction.

I directed the jury that the evidence of the prisoner was taken before a Court properly constituted and of competent jurisdiction, but intimated that I would state a case for the opinion of the Court of Crown Cases Reserved.

The jury convicted the prisoner, and he was released on bail pending the decision of the point reserved.

The question for the Court of Crown Cases Reserved is:—

Whether the indictment is supported by the evidence, having regard to the facts that although the oath was properly administered before a competent Court the registrar was to the extent and under the circumstances above detailed absent when the particular questions were answered on which perjury is assigned. (1)

(1) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27, sub-ss. 1, 2, 3, 4, 5. (1.) "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon a before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property. (2.) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination. (3.) The Court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property. (4.) If any person on examination before the Court admits that he is indebted to the debtor, the Court may, on the application of the official receiver or trustee, order him to pay to the receiver or trustee, at such time, and in such manner as to the Court seems expedient, the amount admitted or any part thereof, either in full discharge of the whole amount in question or not, as the Court thinks fit, with or without costs of the examination. (5.) If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may, on the application of the official receiver or trustee, order him to deliver to the official receiver or trustee such property, or any part thereof, at such

1887

THE QUEEN v. LLOYD.

M'Connell, for the prisoner. Perjury cannot be assigned upon evidence given in proceedings under the Bankruptcy Act, 1883, s. 27, sub-s. 1, unless such evidence has been given "before" the Court. An examination of a person summoned before the Court under s. 27, sub-s. 1, which has taken place in the absence of the judge or an officer of the Court is not a proceeding "before" the Court. According to sub-s. 3, it is "the Court" which examines on oath, and by sub-ss. 4 and 5 respectively, the examination is to take place "before" the Court. Rule 88 distinctly contemplates the presence of the registrar, for it speaks of "a witness refusing to answer to the satisfaction of the registrar any question which he may allow to be put." The irregular mode of examination described in the case is common in bankruptcy proceedings, but persons thus irregularly examined cannot be indicted for perjury.

Mulholland, in support of the conviction. The prisoner was properly examined by "the Court" within the meaning of s. 27.

In *In re Sir John Moore Mining Co.*, Bacon, V.C., said (1), speaking of this method of examination, "it is the everyday practice in examinations before the registrar in bankruptcy." It is impossible for the registrars, without a large addition to their number, to attend personally throughout the numerous examinations which take place in bankruptcy. The registrar, having sworn the witness and remaining within call in case his intervention were required, was legally present when the questions were answered.

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time and in such manner and on such terms as to the Court may seem just."

Bankruptcy Rules, 1886, r. 66. "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination on oath before the Court or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the Court may direct." Rule 88: "If a debtor or witness examined before a registrar refuses to answer to the satisfaction of the registrar any question which he may allow to be put, the registrar shall report such refusal in a summary way to the judge, and, upon such report being made, the debtor or witness in default shall be in the same position and be dealt with in the same manner as if he had made default in answering before the judge."

(1) W. N. 1878, p. 87.

1887

THE QUEEN v. LLOYD.

LORD COLERIDGE, C.J. The case is plain. Perjury is assigned under these circumstances. A man is brought before the registrar, who, under the Acts and Rules, is the Court. The registrar administers the oath, but ceases to take any active part in what follows. He goes away and transacts other business. The witness who, according to the Act and Rules, is to be examined before him, is taken to a room where the examination proceeds in the registrar's absence. What has been called his legal presence is his actual absence. The witness is then indicted for perjury committed before the registrar. But the examination has not been conducted before the registrar. It is clear therefore that the conviction cannot stand. The terms of the Act and the Rules expressly require the personal presence of the judge or his representative for the conduct of the proceeding and the protection of the person under examination. As to the practice which has been invoked, it is most reprehensible and should at once and for ever be discontinued.

DENMAN, J. It is only necessary to look at the words "before the registrar" in each count of the indictment in the light of admitted facts to see that the conviction cannot stand. The practice which has been said to prevail is as illegal as it is unfair.

POLLOCK, B., concurred.

HAWKINS, J. I agree that the facts dispose of this indictment. It is said in the case that the registrar was at hand and ready to come if wanted. But this does not disturb the fact that he was not in the room. The examination which is said to have taken place before him took place behind his back. I have had many opportunities of observing this practice, and I consider its results bad and unsatisfactory. I am glad the Court has had an opportunity of expressing its opinion on the subject.

STEPHEN, J. The conviction must obviously be quashed. As to what we have been told about the necessity for more registrars, I can only say that it is a very bad form of economy to allow

important judicial duties to be inefficiently discharged. It should be clearly understood that evidence taken under such circumstances is not evidence at all.

Conviction quashed.

Solicitors for prosecution: *Yates, Stananought & Johnson, Liverpool.*

Solicitor for prisoner: *Neale, Liverpool.*

H. D. W.

GARDNER, APPELLANT; MANSBRIDGE, RESPONDENT.

April 19; *July* 5.

Criminal Law—Malicious Injuries to Property Act, 1861 (24 & 25 *Vict. c.* 97), *s.* 52—*Damage to Real Property—Mushrooms growing in a wild state.*

In order to constitute the offence of wilfully or maliciously committing damage, injury, or spoil to or upon any real property under s. 52 of the Malicious Injuries to Property Act, 1861, there must be proof of actual damage to the realty itself, and mere damage to uncultivated roots or plants growing upon the realty is insufficient to justify a conviction.

The respondent gathered mushrooms in a field belonging to the appellant. They were of value to the latter, but they grew spontaneously, and were entirely uncultivated. No damage was done by the respondent to the grass or the hedges:—

Held, that, upon the above facts, the respondent had not been guilty of an offence within s. 52 of the Act.

CASE stated by justices for Sussex under 20 & 21 Vict. c. 43.

Upon the hearing of a summons taken out by the appellant against the respondent under 24 & 25 Vict. c. 97, s. 52, charging that the respondent did wilfully and maliciously commit damage on New House Farm to certain herbage, mushrooms, and fences there to the amount of 2*s.*, the justices dismissed the summons, subject to a case, of which the following are the material parts:—

The appellant was the occupier of New House Farm, in one of the fields belonging to which there grew mushrooms which were a source of profit to him, being worth about seven pounds a year. The appellant did not cultivate the field for the growth of mushrooms, but they grew there in a wild state, and cattle were turned out to graze in the field by the appellant. The appellant saw the respondent in the field apparently picking mushrooms; the latter ran away, but was caught in an adjoining field, and the appellant

1887

GARDNER v. MANSBRIDGE.

found about two shillings' worth of mushrooms in his basket. Some of the mushrooms were said to be smaller than the appellant would have gathered, and it was said that if they had been allowed to grow until the next day they would have been worth double their then value. No damage was done to the grass or the fences.

The justices held that as the mushroooms were growing in a wild and spontaneous manner they did not come within the definition of "cultivated roots or plants," so as to be within the provisions of s. 24 of the Malicious Injuries to Property Act, 1861, and that the circumstances of the case did not bring it within s. 52 of that Act.

The question for the Court was, whether the taking of mushrooms growing in a wild state in the manner described in the case would subject the respondent to a conviction under either s. 24 or s. 52 of the said Act. (1)

April 19. *Corrie Grant*, for the appellant.

Boxall, for the respondent.

The arguments appear sufficiently from the judgment.

[They cited *Laws* v. *Eltringham* (2) and *Reg.* v. *Prestney*. (3)]

Cur. adv. vult.

July 5. The judgment of the Court (A. L. Smith and Wills, JJ.) was delivered by

A. L. SMITH, J. The question for determination in this case is, whether a person who gathers mushrooms growing in their

(1) Sect. 24 of 24 & 25 Vict. c. 97, makes it an offence punishable on summary conviction with imprisonment for a term not exceeding one month, or a fine of twenty shillings, in addition to the amount of the injury, to "unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast . . . and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground."

Sect. 52 makes it an offence punishable on summary conviction with imprisonment for a term not exceeding two months, or a fine of 5*l*., in addition to a sum not exceeding 5*l*. as compensation for the damage, to "wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided."

(2) 8 Q. B. D. 283.

(3) 3 Cox, 505.

natural state in a field, and who does no other damage or injury except what may be done by the fact of gathering and carrying away the mushrooms themselves, can be found guilty of having "wilfully *or* maliciously" committed any damage, injury, or spoil to or upon any real or personal property of a public or private nature within the true intent and meaning of s. 52 of the Malicious Injuries to Property Act, 1861 (24 & 25 Vict. c. 97).

It could not, in our judgment, be really contended that a person who merely picked mushrooms growing in a state of nature in a field was guilty of maliciously committing injury to real or personal property, but it is to be noticed that in this 52nd section the words are not "wilfully and maliciously" but "wilfully or maliciously," and it is said that an offence is created by this section if a person wilfully commits the act even though he has no malice, or, in other words, if he does the act complained of intentionally and on purpose. To this proposition we assent, but the question remains whether the act complained of is damage, injury, or spoil to or upon real or personal property within the meaning of the Act. It was argued that there are only two kinds of property, real and personal, and if the act complained of was not damage to personal property (which in this case it was not) it must consequently be injury to real property within the meaning of the Act. To this we do not assent. The question is, do the words used in the Act creating the offence mean damage, injury, or spoil to the realty itself or to the product of the realty which may happen to be growing thereon at the time of the commission of the act. This, as it appears to us, is the point in this case.

In our judgment the legislature, in the group of sections commencing at s. 16 and ending at s. 24, deals with the products de facto growing upon the realty itself as something distinct and apart from the realty. For instance, ss. 20, 21, and 22 deal with injuries to trees, saplings, shrubs, and underwood, and makes injuries to such things offences under the Act; why so, if such trees, saplings, shrubs, and underwood were to be taken as part of the realty? Again, s. 23 deals with injuries to plants, roots, fruit and vegetable productions growing in a garden; why, we ask, if such are to be taken as part of the realty? Moreover,

1887

GARDNER v. MANSBRIDGE.

A. L. Smith, J.

s. 52, which is the section here in question, has a proviso in s. 53. Sect. 52, together with this proviso, reads as follows: "Whoever wilfully or maliciously commits any damage, injury, or spoil to or upon any real or personal property whatsoever (including injuries to trees, saplings, shrubs, or underwood) either of a public or private nature, for which no punishment is hereinbefore provided, shall be guilty of an offence." We are aware that it may be said that the proviso was inserted so that it might not be argued that injury to a tree under the value of 1*s.* was not punishable under the Act (see s. 22), and we think this may have been so; but in our judgment the proviso also tends to shew that the legislature did not consider the damage to things growing upon the realty was damage to the realty itself. We are unable to give the reason, nor has any been given at the bar, why the phraseology of s. 52 should have been altered from "unlawfully *and* maliciously," which is that used in ss. 16 to 24 and in many other sections, to "wilfully *or* maliciously."

The history of the legislation on this matter is this. By 6 Geo. 3, c. 48, s. 4, persons were made punishable by summary conviction, who should, "not being lawful owners thereof," go into woods or underwoods, and commit certain classes of damage to wood, underwood, &c. By 9 Geo. 3, c. 41, s. 8, similar pains and penalties were imposed upon persons who, "without legal right or authority," should cut down or destroy hollies or thorns, or certain other specified things growing within woods or wood grounds. By 1 Geo. 4, c. 56, s. 1, persons were rendered punishable by summary conviction who should "wilfully *or* maliciously do any damage to or upon (inter alia) any building, fence, hedge, tree, wood, underwood, orchard, garden . . . crops, vegetables, plants, land, or other matter or thing, growing or being thereupon, or to or upon real or personal property of any nature or kind soever." By 7 & 8 Geo. 4, c. 27, these and a vast number of Acts creating offences of various descriptions were repealed, and by other Acts of the session their provisions were consolidated and amended. Cap. 30 of that session is the Act for consolidating and amending the laws relative to malicious injuries to property, and in this Act the classes of acts which were before made punishable, if done by persons "not being the lawful

owners" of the property to which they related, or if done "without legal right or authority," were for the most part introduced into the new Act, but made punishable if done "unlawfully *and* maliciously." The language of 1 Geo. 4, c. 56, s. 1, in so far as it made the offence complete if done "wilfully *or* maliciously" was preserved, though the class of acts so dealt with was restricted considerably. It may be the difference escaped the draftsman, the conjunction "or" however is in 7 & 8 Geo. 4, c. 30, s. 24, from whence it has been copied into the similar consolidating and amending Act 24 & 25 Vict. c. 97, and, whatever its origin may be, there it is, and must be given effect to and respected.

We are aware that in the present case the defendant had gathered mushrooms to the value of 2*s.*, and that it is found by the justices in the case that the field where they were gathered grew annually mushrooms to the value of 7*l.*, but this in our judgment can make no difference to the determination of this case. It has been held that to bring a case within the Act for causing malicious injury to property, some actual positive damage must be proved, and the imaginary damage will not suffice (see per Best, C.J., in *Butler* v. *Turley* (1)); but in our judgment it is not the amount of damage done (if some actual damage is proved), which is the test whether or not an offence within the Act has been committed. The legislature moreover has, by s. 24 of 24 & 25 Vict. c. 97, made it an offence to unlawfully and maliciously destroy or damage with intent to destroy any cultivated root or plant used for food of man and for other purposes therein named, and has not made it an offence (unless it has done so by s. 52) to destroy or damage uncultivated roots or plants. In our judgment to constitute an offence within s. 52 for committing damage, injury, or spoil, to real property, proof must be forthcoming of actual positive damage (to use the words of Best, C.J.) to the realty itself, and if, as in this case, proof of damage is confined solely to damage to the product growing upon the realty and consequent loss to the owner of such product, no offence is established within s. 52 of the Act.

There are numerous sections in the Act, as above pointed out, making it an offence to damage the product of realty, and in our

(1) 2 C. & P. 585, at p. 589.

1887

GARDNER v. MANSBRIDGE.

A. L. Smith, J.

judgment unless a case is brought within those special sections relating to such products, damage done to the product alone and not to the realty itself is no offence within the Act. The words of the Act are "damage to real property," not "loss to the owner thereof." To hold otherwise would render a person liable to be convicted of a crime and sent to hard labour for two months for merely gathering primroses, blackberries, or the like, upon proof given of some actual loss to the owner thereof, whereas the legislature by s. 24 has only created the penalty of one month for maliciously destroying any cultivated root or plant used for the food of man. Can it be conceived that the legislature intended that for simply gathering mushrooms growing wild in a field and uncultivated, a person might be liable to two months' hard labour, whereas for maliciously destroying cultivated roots or plants used for food of man, he was only to be liable to one month? It seems to us impossible. The case of *Laws* v. *Eltringham* (1) has decided nothing contrary to the above; for in that case it was not necessary to decide the point now under discussion, nor was it decided or indeed discussed.

In our judgment the justices were right in refusing to convict in this case; no damage to the realty itself was proved, and the sole evidence of damage given was the loss of the mushrooms to the owner. The remedy of the appellant was by action of trespass in a county court, and not by a criminal prosecution before justices, and this appeal must be dismissed, and with costs.

Judgment for the respondent.

Solicitors for appellant: *Sowton, for Buckwell, Brighton.*
Solicitors for respondent: *Prince, Ayres & Co., Brighton.*

(1) 8 Q. B. D. 282.

W. J. B.

ODELL *v.* CORMACK BROTHERS.

1887

April 19; June 9.

Bill of Exchange—Acceptance—Bill drawn on Firm—Acceptance in Name of Individual—Principal and Agent—Authority to accept.

The defendant, a partner in a firm of C. Brothers, agreed with her co-partner that the partnership should be dissolved, that the affairs of the firm should be liquidated by an agent, who should realize the assets and pay the creditors, and that the business should thereafter be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account, signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers, and accepted by the agent in the names of the defendant and himself, and honoured. The defendant knew nothing of these cheques and bills.

The plaintiff sued as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened:—

Held, that the agent had no authority to accept the bill in the defendant's name, so as to bind her, and that, not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable.

Kirk v. *Blurton* (9 M. & W. 284) commented on and distinguished.

THIS was an action by the plaintiff, as indorsee for value of a bill of exchange, against the defendant as acceptor. The circumstances of the drawing and acceptance of the bill, and all the material facts of the case, are stated in the judgment.

April 19, 1887. The action came on for trial before Hawkins, J., without a jury.

H. Kisch, for the plaintiff.

A. P. Stone, for the defendant.

Cur. adv. vult.

June 9. HAWKINS, J., read the following judgment. This action was brought by the plaintiff, as indorsee for value, to recover the principal and interest alleged to be due from Mrs. Margaret Cormack, as the sole representative of the firm of "Cormack Brothers," on a bill of exchange dated the 23rd of March, 1886, drawn by one Otto Seefel upon "Cormack Brothers," for 58*l.* 11*s.* 3*d.*, payable three months after date, and indorsed by Seefel to the plaintiff.

1887

ODELL v. CORMACK.

Hawkins, J.

The bill was accepted in these words:—

"Accepted, payable London Joint Stock Bank, Princes Street, London. Margaret Cormack and R. Carter."

The whole of the acceptance, including both signatures, was written by one Richard Carter.

The first question is whether that acceptance was ever binding upon Mrs. Cormack; the second, whether, assuming her to have been once liable upon it, she has been discharged from such liability by reason of a judgment obtained against Carter in another action brought subsequently to this against Mrs. Cormack and Carter jointly.

Previous to the month of November, 1882, the firm of "Cormack Brothers" consisted of Margaret Cormack and George Balfour Cormack, who carried on business in partnership at No. 37, Ludgate Hill.

On the 24th of that month, by an agreement under seal between the defendant Margaret Cormack and G. B. Cormack, the partnership was dissolved, and it was stipulated, among other things, that the affairs of the said firm should be liquidated by and under the direction of Richard Carter, who was thereby empowered as attorney and agent of the parties thereto to *realise the assets*, and to *pay the creditors* and costs of the liquidation, and in so doing to execute and do all such acts, deeds, and things, and make such compromises, in the names and on behalf of the parties thereto, or either of them, as he the said attorney might think expedient, and with *power to borrow* any sum or sums of money he might require from time to time, *in connection with such liquidation*, and upon such securities as he might think fit. It was by the said agreement further stipulated that from and after that date (Nov. 24, 1882) the business of the said firm of Cormack Brothers might be carried on by the said Margaret Cormack, either alone or in conjunction with such person or persons as she might think fit to appoint, with full power to make such arrangements with the creditors as the said Margaret Cormack or the said Richard Carter might think fit. On the same November 24 Mrs. Margaret Cormack and R. Carter addressed to the London Joint Stock Bank a request that the bank would open an account in their joint names; such request was as follows:

"Joint Account,

London, November 24, 1882.

To the London Joint Stock Bank, Limited.

We request that you will open an account in your books in our joint names, and that you will honour to the debit of such account all drafts, orders, &c., signed by either of us, and that you will deliver all securities, boxes, and other property, which you may at any time receive for our behalf, against orders signed in a similar manner.

Specimen signature,	Full name, description, and address.
Margaret Cormack,	8 St. John's Villas, E. Dulwich (widow).
R. Carter.	Richard Carter, 4 Bury Court, St. Mary Axe, E.C."

In compliance with this request, a joint account was opened in the books of the bank in the names of Margaret Cormack and Richard Carter. Upon this joint account various cheques were drawn, all of which were filled up and signed by R. Carter, thus: "*Margaret Cormack & Self, R. Carter*," and several bills of exchange drawn upon "Cormack Brothers, 37 Ludgate Hill," and accepted by and in the handwriting of Carter, "*Margaret Cormack & Self, R. Carter*," were also made payable at the bank and honoured.

It was not proved before me that Margaret Cormack ever signed either a cheque or an acceptance against the joint account, *or that she ever had personal knowledge* of the cheques and bills so drawn and accepted by Carter.

No account at the bank was open in the name of Cormack Brothers after November, 1882, nor was any acceptance signed "Cormack Brothers" proved to have been given since that date. It was proved that Seefel gave Carter cash for the bill, Carter representing that "his pay day was close," but how Carter applied the money he so received there was no evidence. On July 2, after this action was brought, the solicitors for Mrs. Cormack wrote to the plaintiff's solicitor, stating that the position of the business was about to be investigated, with a view of means being found for liquidating the claims upon it, including that of the plaintiff, and requesting that the matter might stand over for a

1887

ODELL v. CORMACK.

Hawkins, J.

short time. On July 6, however, another letter was written by the defendant's solicitors, repudiating all liability, and stating that after inquiry it had been ascertained that the bill was an accommodation transaction between Seefel and Carter, and in no way related to the business of Cormack Brothers, that the business had no benefit from the transaction, and that Carter had no authority to accept the bill on Mrs. Cormack's behalf.

On this state of things the first question for consideration is whether the acceptance was ever binding upon Mrs. Cormack. For the defendant it was contended that the bill being drawn on "Cormack Brothers," the style of the business firm, it ought to have been accepted in that style, and for this proposition *Kirk* v. *Blurton* (1) was relied on. It is not necessary to consider to what extent that case has been modified by more recent decisions, because it does not seem to me to be at all decisive of the present case. In *Kirk* v. *Blurton* (1) the firm consisted of two persons, one of whom indorsed a bill by a style other than that of the firm, and it was held that the firm was not liable. In the present case the bill was drawn on Cormack Brothers, a firm consisting of *one person only*, viz., Margaret Cormack. I take it to be clear beyond all doubt that she might have accepted a bill drawn on Cormack Brothers in her own name, and have bound herself by such acceptance just as much as if she had used the style of the firm, and of course what she might have done herself she might authorize anybody else to do for her. If, therefore, Mrs. Cormack had authorized Carter to accept bills drawn on the firm in her own name, I should have held the acceptance in question to be sufficient to bind her, and that the addition of his own name would have been immaterial and might have been rejected as mere surplusage.

This leads me to consider whether Carter had such authority? I am of opinion that he had not. He was *not a partner* in the firm of Cormack Brothers, nor was he ever held out as such; he had therefore no implied authority to accept the bill so as to bind Mrs. Cormack.

Even had he been an actual partner, he could only have accepted in the name of the firm, and could not have signed the name of Margaret Cormack without her express sanction—which

(1) 9 M. & W. 284.

sanction he never had. I do not regard the request to the bank above set forth as at all assisting the plaintiff's case. That request only had reference to the joint account which was about to be opened in the joint names of "Margaret Cormack and Richard Carter." It did not in its terms constitute a partnership at all, nor was it intended that Mrs. Cormack and Carter should be treated as partners. Still less did it recognise Carter as a member of "Cormack Brothers," which firm was never even mentioned. It was intended merely as a direction to the bank how the *joint account* might be drawn against, viz., by either of the persons in whose names it was opened. The joint account and the firm of Cormack Brothers were two distinctly different things. In the joint account Mrs. Cormack and Carter were jointly interested,—in the firm Mrs. Cormack alone. The request to the bank gave neither power to bind the other, except so far as related to the joint account. It authorized the bank to honour, that is, to pay out of the funds standing to the credit of the joint account, drafts, orders, &c., signed by either of the parties to it; but it did not in my opinion confer power upon either to affect the other to the extent of one penny beyond the amount standing to the credit of the account.

No authority of Mrs. Cormack to accept the bill in question can be inferred from the fact that many cheques, and some acceptances of similar bills, were honoured by the bank and placed to the credit of the joint account without objection. First, it was not proved that Mrs. Cormack was cognizant of these matters; secondly, as regards the cheques, they were drawn as it was contemplated they should be, that is, signed by one of the parties, viz., R. Carter, and as regards the acceptances, no doubt the bank thought that inasmuch as they bore the signature of R. Carter, professing to sign on behalf of Mrs. Cormack and himself, they were in order in honouring them, as they would have honoured that in question had there been sufficient money to the credit of the account. I think, however, a little closer inspection of the bills would have induced the bank to hesitate; for bills of exchange drawn against the joint account should have been drawn, not upon Cormack Brothers, but upon "Margaret Cormack and Richard Carter," the only style by which they were jointly recognised. Bills so drawn might, I think, properly have

1887

ODELL v. CORMACK.

Hawkins, J.

been paid by the bank out of the joint account, whether signed by both or one only under the powers contained in the request to the bank, though I very much doubt whether that acceptance by and in the name of one only would have taken effect as a joint acceptance so as to make the other responsible to an ordinary holder. As regards bills drawn on Cormack Brothers, as this was, Carter had nothing to do with them; he was not a drawee, he had no right to accept in the name of the firm, and he could not make himself liable as a joint acceptor by signing the acceptance as he did. It is not necessary to consider whether he may by his signature have rendered himself liable in some form of action. I have only to deal with the liability of Mrs. Cormack. This liability is not established to my satisfaction, and as a matter of fact I find that she did not authorize Carter to accept the bill for her, either in the name of her firm or in her own name as the sole representative of it.

The view I have taken upon the question of Mrs. Cormack's liability as acceptor renders it unnecessary to discuss the effect of the judgment obtained against R. Carter alone in another action, brought subsequently to this against Mrs. Cormack and R. Carter by name, and charging them jointly as acceptors of the bill in question. I am, however, very strongly disposed to think that if a joint liability could have been established against Mrs. Cormack and Carter, the fact that that action was abandoned against Mrs. Cormack, and judgment afterwards signed against Carter alone, would have afforded her a good defence to the action now before me: see *King* v. *Hoare* (1); *Kendall* v. *Hamilton* (2); and I do not think the effect of that judgment, so far as Mrs. Cormack was interested, could have been altered to her prejudice by the plaintiff's obtaining, with Carter's consent, a Master's order to set it aside.

For the reasons I have expressed my judgment is for the defendant with costs.

Judgment for the defendant.

Solicitor for plaintiff: *Rossiter.*

Solicitors for defendant: *Collyer-Bristow, Withers, Russell, & Hill.*

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.

P. B. H.

CAMBEFORT & Co. *v.* CHAPMAN. 1887

Partnership—Liabilities—Sale of Goods—Bill given for Price—Unsatisfied Judgment on Bill—Action against Joint Contractor for Price—Res Judicata. *June* 9; *July* 7.

An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract.

The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved. The plaintiffs, who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership name. The plaintiffs sued W. in the partnership name on the bills, and recovered judgment, which was not satisfied. The plaintiffs afterwards sued the defendant for the price of the goods:—

Held, that the case was within the principle of *Kendall* v. *Hamilton* (4 App. Cas. 504), and the judgment against W. on the bills was an answer to the action.

Drake v. *Mitchell* (3 East, 251) distinguished.

ACTION for goods sold and delivered. The plaintiffs, who were merchants carrying on business at Lyons, sold and delivered the goods in question to a firm trading as Wilson & Co., which firm then consisted of a person named Wilson and Chapman the defendant in the present action. After the delivery of the goods the partnership between Wilson and Chapman was dissolved. Afterwards the plaintiffs, who were not then aware of the dissolution of partnership, drew two bills of exchange on Wilson & Co. to cover the price of the goods. These bills were accepted by Wilson in the name of Wilson & Co. A portion of the amount secured by one of the bills was paid, but nothing was paid on the second bill. The plaintiffs issued a writ against Wilson & Co. to recover the balance due on the bills, and recovered judgment for default of appearance. The plaintiffs, being unable to obtain satisfaction of this judgment, commenced the present action against Chapman for the price of the goods. The defendant delivered a defence, which he afterwards amended by adding the following paragraph:—

"If the plaintiffs sold and delivered the said goods to the said partnership firm (which the defendant does not admit), the plaintiffs recovered a judgment in the Queen's Bench Division on January 1, 1886, against the said Wilson sued as Wilson & Co.,

1887

CAMBEFORT v. CHAPMAN.

in respect of the goods, the subject matter of this action, and the plaintiffs are precluded by the said judgment from recovering in this action."

At the trial Mathew, J., was of opinion that the judgment against Wilson was a bar to the plaintiffs' claim in the present action, and the verdict and judgment were entered for the defendant.

The plaintiffs now moved for a new trial, or to enter judgment for the plaintiffs.

1887. June 9. *W. Willis, Q.C.*, (*Crispe*, with him), for the plaintiffs. There were two separate and distinct contracts, the contract for the sale of the goods, made between the plaintiffs and the firm of Wilson & Co., which then consisted of Wilson and Chapman, and the contract on the bills, the parties to which were the plaintiffs and Wilson alone. Chapman was not a party to the contract on the bills, and the judgment recovered on that contract against Wilson cannot affect the right of the plaintiffs to recover against Chapman on the other contract. In this respect the case is distinguishable from *King* v. *Hoare* (1) and *Kendall* v. *Hamilton* (2), but it is governed by *Drake* v. *Mitchell* (3), which is a distinct authority for the plaintiffs' contention. The judgment is no defence without satisfaction.

J. G. Witt, (*Pritchard*, with him), for the defendants. In *Drake* v. *Mitchell* (3) the original security was a specialty, and the case is therefore distinguishable. If not, it is not now good law. The present case is undistinguishable in principle from *King* v. *Hoare* (1) and *Kendall* v. *Hamilton*. (2) The plaintiffs are suing for what is in substance the same debt as that for which they have already recovered judgment in the action against Wilson. He also referred to *Calder* v. *Dobell* (4); *In re Cumberland, Ex parte Worthington* (5); *Misa* v. *Currie* (6); *Scarf* v. *Jardine*. (7)

Willis, Q.C., replied.

Cur. adv. vult.

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) 3 East, 251.
(4) Law Rep. 6 C. P. 486.
(5) 3 Ch. D. 803.
(6) Law Rep. 10 Ex. 153; 1 App. Cas. 554.
(7) 7 App. Cas. 345.

July 7. The following judgments were delivered:— 1887

CAMBEFORT v. CHAPMAN.

FIELD, J. This was an action brought by the plaintiffs, who are merchants at Lyons, for the price of goods sold and delivered. The facts of the case are somewhat peculiar. The defendant was in partnership with a person named Wilson, and they carried on business under the style of Wilson & Co. There is no doubt that the goods were sold and delivered, and the defendant has had the benefit of them, and has not paid for them, and no one has paid for them; yet I am compelled to hold that the plaintiffs cannot recover. There is a rule of law, which I am bound to observe, although in the present case it presses hardly on the plaintiffs. When the goods were delivered the firm consisted of Wilson and Chapman, but Chapman's name did not appear, the name of the firm being Wilson & Co. Afterwards bills were given for the price of the goods, and were accepted in the name of Wilson & Co. When these bills were accepted Chapman was no longer a partner in the firm, but the plaintiffs did not know this. The plaintiffs, under the powers given by the Rules made under the Judicature Acts (1), sued the firm on the bills, in the name of the firm, without ascertaining the names of the partners. Although they did not know it, they were suing Wilson only. They recovered judgment, but they never realized the amount of the judgment. Afterwards they sued the present defendant for the price of the goods, and after the commencement of the action he found out that judgment had been recovered against Wilson. He thereupon obtained leave to amend his defence by adding a paragraph alleging that the plaintiffs had recovered judgment against Wilson in respect of the goods which were the subject-matter of the action against the defendant, and that the plaintiffs were thereby precluded from recovering against the defendant. He avoided averring satisfaction of the judgment, and thus made his defence true. At the trial Mathew, J., held, in my opinion correctly, that the facts alleged in the defence, and proved, formed a bar to the action. Mr. Willis, for the plaintiffs, moved for a new trial, or to enter judgment, on the ground that the judgment against Wilson without satisfaction could not be an answer to the plaintiffs' claim. His contention is met by the

(1) R. S. C. 1883, Order XVI. r. 14.

1887

CAMBEFORT v. CHAPMAN.

Field, J.

technical rule established as long ago as 1844 in the case of *King* v. *Hoare*. (1) That decision has been much criticised, but it came before the House of Lords in *Kendall* v. *Hamilton* (2), where, against the opinion of Lord Penzance, the majority of the House held that *King* v. *Hoare* (1) was rightly decided. Applying the principle underlying those decisions to the present case, we find that the plaintiffs' contract was a joint contract with Wilson and Chapman; there was no joint and several contract, but only one joint contract. The principle of the maxim "nemo debet bis vexari" applies not only to the case of one individual being sued twice for the same cause of action, but also to the case of a person suing twice on the same contract. Here the plaintiffs had converted the liability on the joint contract into a liability on a judgment, so that they had a security of a higher nature than the mere right to recover on the contract, and therefore the maxim "transit in rem judicatam" applies; and although in this particular case there was only a writ issued, and no appearance, and no trial, and the amount of costs incurred was necessarily very small, and the result will be that the plaintiffs will lose a large sum, still I cannot see any way out of it, and feel bound to hold that the contract is merged in the judgment, and therefore the plaintiffs must fail. I need not go into the reasons on which the decision in *Kendall* v. *Hamilton* (2) was based; it is enough to say that the decision is law, and I am bound by it.

Mr. Willis cited *Drake* v. *Mitchell* (3) as an authority in favour of the plaintiffs' right to recover. There it was held that where one of three joint covenantors gave a bill for part of a debt secured by the covenant, and judgment was recovered against him on the bill, that judgment was no bar to an action of covenant against the three. On looking into that case it is clear that the decision proceeded on the technical rule that the giving of a bill of exchange could not suspend the remedy on the covenant, which was a security of a higher nature. Therefore the only question here is whether the bills and the consideration for them can be treated as giving two separate and distinct causes of action; but to do so would be inequitable, and if we

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.
(3) 3 East, 251.

1887

CAMBEFORT v. CHAPMAN.

were to hold that they could be so treated we should be deciding in opposition to the decision in *Bridges* v. *Berry*. (1)

For these reasons I am of opinion that the plaintiffs' motion ought to be dismissed with costs.

MANISTY, J. I am of the same opinion, and to my mind the case is very clear.

I think the law is as stated in Byles on Bills (2): "Judgment recovered on a bill or note is an extinguishment of the original debt, as between the plaintiff and the defendant. But it alone, without actual satisfaction, is no extinguishment as between the plaintiff and other parties not jointly liable with the original defendant," and this statement of the law agrees with that in Bayley on Bills. (3) In the present case Chapman was liable for the price of the goods jointly with Wilson, against whom the judgment was recovered on the bills. A few lines further on in Byles on Bills is the following statement: "But a judgment recovered against one of several joint makers or joint acceptors, though without satisfaction, is a good defence to an action against the others," and for this proposition *King* v. *Hoare* (4) and *Kendall* v. *Hamilton* (5) are cited. *Kendall* v. *Hamilton* (5) was decided by six members of the House of Lords as against one who dissented. They dealt elaborately with the law and the reasons on which it was based, and came to the conclusion that the law had not been changed and that the decision in *King* v. *Hoare* (4) was right.

In the present case Wilson was sued, in the name of the firm, on the bills which were given for the price of the goods, and it was suggested that this circumstance made a difference, and that the decision in *King* v. *Hoare* (4) did not apply; but it is clear that this argument is fallacious, for suppose that to an action on the bills it were pleaded that there was no consideration for the bills; the answer to that defence would be that the consideration was the price of the goods. It follows that the judgment against Wilson on the bills extinguishes all liability for the price of the

(1) 3 Taunt. 130.
(2) 14th ed. p. 313.
(3) 6th ed. p. 334.
(4) 13 M. & W. 494.
(5) 3 C. P. D. 403, since affirmed in the House of Lords, 4 App. Cas. 504.

1887

CAMBEFORT v. CHAPMAN.

Manisty, J.

goods. Another authority in favour of this view is the case of *Buckland* v. *Johnson*. (1) As to *Drake* v. *Mitchell* (2), I agree that it is distinguishable from the present case on the ground suggested by Field, J., namely, that the covenant was a security of a higher nature than a bill of exchange; but I think there is another and perhaps a more substantial ground, which is, that the bill in that case was a collateral security, and was not given for the same liability or debt as was secured by the covenant. There are therefore two distinct grounds on which *Drake* v. *Mitchell* (2) is substantially distinguishable from the present case. The law has been declared in terms which leave no room for doubt, and for the reasons which I have given I have come to the conclusion that the defendant is entitled to judgment.

Motion dismissed.

Solicitor for plaintiffs: *Henry Keeble.*

Solicitors for defendant: *Pritchard & Sons.*

P. B. H.

June 8.

[IN THE COURT OF APPEAL.]

IN RE WATSON. EX PARTE PHILLIPS.

Executor and Administrator—Contracts made whilst no Personal Representative of a Deceased's Estate—Ratification—Services for Benefit of Estate.

During a period in which there was no personal representative of the estate of a deceased testatrix, the appellant, acting upon the instructions of Easton, a relative of the deceased, did work as a solicitor in respect of the administration and for the benefit of the estate. Subsequently the respondent Phillips obtained letters of administration de bonis non, and refused to pay the appellant's bill of costs:—

Held (affirming the decision of the Queen's Bench Division), that the respondent was not bound, as administrator, to pay such costs.

APPEAL from a decision of the Queen's Bench Division (3) ordering a review of the taxation of a solicitor's bill of costs against the administrator of a deceased's estate, and directing that certain items in the bill should be struck out.

The solicitor appealed.

(1) 15 C. B. 145. (2) 3 East, 251.

(3) 18 Q. B. D. 116.

The facts are fully stated in the report in the Court below, and for the purposes of this report sufficiently appear from the head-note hereto.

H. F. Dickens, for the respondent, took the preliminary objection that the appeal was out of time, having been brought after the expiration of twenty-one days.

H. D. Greene, Q.C., for the appellant, contended that the order appealed from was a final order, and, if it was not, asked for an extension of time.

THE COURT held that the order appealed from was an interlocutory order, and that the appeal was therefore out of time; but they consented to hear it as an indulgence.

H. D. Greene, Q.C. (*W. E. Gordon*, with him), for the appellant. The estate of the deceased having been benefited by the services rendered to it by Watson, the solicitor, whilst there was no personal representative, and Phillips having received that benefit as administrator, he is bound to pay for those services. It is inequitable and against conscience that he should not. There is no authority for or against his liability to pay under such circumstances. By accepting the benefit on behalf of the estate he has in effect ratified the contract made between Watson and Easton.

Bigham, Q.C., and *H. F. Dickens*, for the respondent, were not heard.

LORD ESHER, M.R. As to the costs charged by Watson for work done during the interval in which there was no legal representative of the deceased's estate, Watson acted as a mere volunteer in doing that work, and he did it upon the orders of Easton, and not under any contract with Phillips, who subsequently obtained letters of administration. Speaking for myself only, I doubt whether Phillips, after he became administrator, and so was acting in the interests of other persons, could have ratified a prior contract made with himself. But it is clear that Easton had no right to interfere in the matter at all, and if, acting upon his orders, Watson did the work he must look to Easton for

1887

IN RE WATSON. EX PARTE PHILLIPS.

payment. Here there was no contract between Watson and the subsequent administrator, Phillips, and therefore nothing to ratify, nor did Phillips even assume to ratify the contract between Watson and Easton. There is certainly no rule of law or principle of equity which obliges the administrator to pay, as administrator, for work which he has not ordered and which has not been done for him. It was said that the work having been for the benefit of the estate, and Phillips, as administrator, having received that benefit, it would be unconscientious in him not to pay for it. I decline to make new law in order to compel persons to do that which they are bound in conscience to do; and I am not satisfied that it is unconscientious in an administrator to refuse to pay out of other people's money for work done under such circumstances as exist here.

LINDLEY, L.J. I am of the same opinion. We have not to determine whether, if the administrator had decided to pay these costs, he could have recovered them from the estate, but we have, in effect, to tax, upon an order of the Court, the solicitor's bill "against Robert Phillips, the administrator of the personal estate and effects of Harriett Cross."

Now as to the appellant's claim in respect of work done whilst there was no legal representative of the estate, the short answer is that the appellant has not succeeded in bringing himself within the terms of the order. He has inserted in his bill items for which the persons named in the order are not responsible, the items being in respect of work done after Harriett Cross' death and when there was no administrator or administratrix of her estate. I am of opinion that his appeal must be dismissed.

LOPES, L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *T. R. Watson.*

Solicitors for respondent: *Smiles, Binyon, & Ollard, for G. H. Page,* Hay.

W. A.

STONEHAM *v.* THE OCEAN, RAILWAY, AND GENERAL ACCIDENT INSURANCE COMPANY.

1887
June 16.

Insurance, Life—Policy—Death by Accident—"Within the United Kingdom"—Condition in Policy—Notice of Accident—Omission to give Notice—Insurer's Liability.

A policy of insurance covered death caused by accident happening within the United Kingdom, and was made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days.

The assured was accidentally drowned in Jersey. It was impossible to give notice within seven days.

In an action on the policy:—

Held, that the accident happened within the United Kingdom, and that notice was not a condition precedent to the right to recover, and the insurers were liable.

ARGUMENT of points of law raised on the pleadings under Order XXV., r. 2.

The material facts appearing on the pleadings were as follows. The plaintiff sued as the representative of Arthur Richard Warner, deceased, on a policy of insurance, entered into by the defendant company with the deceased, which provided that in the event of the assured sustaining "any bodily injury caused by any external accident, happening within the United Kingdom, or on the continent of Europe, or whilst proceeding from one European port to another in a decked vessel, and if the assured shall die, solely from the effects of such accident, within ninety days after the happening thereof, the company shall pay to the legal personal representatives or assigns of the assured the sum of 1000*l.* at the expiration of three calendar months after satisfactory proof of the death of the assured shall have been given to the company."

There was a provision in the policy "that this policy shall be subject to the conditions indorsed hereon, which shall be considered as incorporated herein."

One of such conditions provided that: "In the event of non-fatal injury by an accident occurring to the assured notice thereof in writing shall be given to the company . . . within seven days of the occurrence thereof."

Another condition was as follows: "In case of fatal accident

1887

STONEHAM v. OCEAN, RAILWAY, AND GENERAL ACCIDENT INSURANCE CO.

notice thereof must be given to the company at the head office in London within the like time of seven days."

The assured was accidentally drowned in Jersey, and notice was not, and under the circumstances of the case could not have been, given to the company in accordance with the last-mentioned condition.

Bosanquet, Q.C. (*Spokes,* with him), for the plaintiff. The defendants are liable for the result of the accident in Jersey, for it happened "within the United Kingdom," within the meaning of the policy. The giving of notice within seven days is not a condition precedent to the defendants' liability on the policy, for it is not expressed to be such, as was the case in *Cawley* v. *National Employers Accident and General Assurance Association* (1), and other cases where the want of notice has been held to afford a defence. Where failure to comply with the conditions is to render the policy void, the intention is expressly stated, as in the clause against travelling out of Europe, and in the condition as to giving notice on engaging in hazardous occupations. The policy should receive a reasonable construction, having regard to all the terms of the contract, and the impossibility of giving notice in some cases, of which the present is one, shews that the defendants' construction is unreasonable.

Cohen, Q.C. (*Wood Hill,* with him), for the defendants. The accident did not happen either in the United Kingdom or on the continent of Europe. The policy is expressly made subject to the conditions, one of which provides that "notice must be given," and, therefore, by the terms of the policy notice is a condition precedent to liability: *Cassel* v. *Lancashire and Yorkshire Accident Insurance Company* (2); *Patton* v. *Employers' Liability Assurance Corporation.* (3) The impossibility of giving notice in the particular case is immaterial: *Gamble* v. *Accident Assurance Company.* (4) The condition is intended to protect the company against fraudulent claims, and should receive a broad construction.

Bosanquet, Q.C., was not heard in reply.

(1) 1 Cababé & Ellis, 597.
(2) 1 Times Law Reports, 495.
(3) 20 L. R. Ir. 93.
(4) Ir. Rep. 4 C. L. 204.

MATHEW, J. I am of opinion that our judgment ought to be for the plaintiff.

As to the first point, the pleadings are, no doubt, somewhat irregular, but I think it is sufficiently apparent that the question which the parties intended to leave to the Court as a question of law is whether Jersey is, in popular language, a part of the United Kingdom. I have no hesitation in saying that it is: I can give no other answer to the question.

The other is a somewhat important point. The policy of insurance is subject to certain conditions, one of which is that "in case of fatal accident notice thereof must be given to the company at the head office in London within the like period of seven days," and the question raised is whether compliance with that stipulation is a condition precedent to the right of the representative of the assured to recover on the policy. This is a question of pure construction, and no case has been cited in which the language was exactly identical with that used in the policy now before us. In some cases it has been expressly agreed that compliance with the terms imposed should be a condition precedent, and in those cases compliance with the terms has been held to be a condition precedent, but where the question is left at large, it is for the Court to say, looking at all the terms of the policy, what the true meaning of the contract is. The obligation undertaken by the company in the present case is, that if the assured shall die solely from the effects of the accident within ninety days, they will pay the sum named within three months after proof of death. The policy is expressed to be made subject to certain conditions; the words are, not that these conditions shall be considered as conditions precedent to liability, but, "Provided also that this policy shall be subject to the conditions indorsed hereon, which shall be considered as incorporated herein."

Among these conditions I find one which provides that for the purpose of identifying the assured notice shall be given in all cases of change of residence, occupation, or name. That clause does not state that the giving of notice shall be a condition precedent to liability. It is followed by a condition in these words: "If the assured shall during the period covered by this policy

1887

STONEHAM v. OCEAN, RAILWAY, AND GENERAL ACCIDENT INSURANCE CO.

Mathew, J.

engage in any other occupation or employment involving a greater risk than is contemplated in class of risks under which this policy is effected, he shall forthwith give notice thereof to the company, and pay such extra premium as may be required in respect of such increased risk, and, in default of his so doing, this policy shall become absolutely void, and the premium paid for the same shall be forfeited to the company." This clause shews that where the failure to comply with a condition is to exonerate the company from liability, the intention that the policy shall bear that construction is made clear by express words.

Then there is a further provision that, "Any question arising under or in relation to this policy shall, if required by the company or the assured, or his representatives, or his assigns, be referred to the decision of two referees," &c.

If the assured or his representatives refused to refer the claim, it could not be contended that the policy became void or that the company could thereby get rid of their liability.

The clause, which I have already read, requiring notice of a fatal accident to be given within seven days, must be intended to apply both to a fatal accident followed by death after a long interval and to an accident instantaneously fatal, and Mr. Cohen was compelled to admit that the construction he was contending for would in many cases render the policy an honour policy, that is, a policy on which the company could pay or not as they thought fit. The notice is not stated to be a condition of liability, nor is there any stipulation that if no notice is given the policy shall be void. The clause is probably inserted in order to save the company from the extra expense which they would incur if they had to investigate the circumstances of accidents at long intervals after their occurrence. On consideration of all the terms of the document, I am satisfied that, according to the correct interpretation, the giving of notice of the accident within seven days is not a condition precedent to the enforcement of the policy.

CAVE, J. I am of the same opinion.

As to the first point, I think it is very clear that Jersey is within the United Kingdom within the meaning of the words of

this policy. Some light is thrown on this question by one of the conditions indorsed on the policy: "This policy shall be void if the assured shall travel beyond the limits of Europe, or shall embark in any vessel with the intention of going beyond such limits." That provision means that the policy shall be in force in Europe, and Jersey is in Europe. In my judgment it is also within the United Kingdom.

The other question turns on the terms printed on the back of the policy, and it is contended on behalf of the defendants that the giving of notice of a fatal accident within seven days is a condition precedent, so that failure to comply with such condition renders the policy void. The conditions indorsed on the policy are of all sorts, and vary much in their language. Some of them contain provisions that in case of non-compliance the policy shall be void; others do not. It seems to me that the rational conclusion is that all these conditions mean what they say, and that where there is a provision that the condition shall be a condition precedent it is so, but where there is no such provision it is not. Except where it is so expressed there is nothing to shew that the terms indorsed on the policy are in the nature of conditions precedent, and there is nothing expressed in the clause now in question which can have the effect of making it a condition precedent. I agree therefore that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitors for plaintiff: *Carter & Bell.*
Solicitors for defendants: *Dawes & Sons.*

P. B. H.

1887
May 19.

[IN THE COURT OF APPEAL.]

CARMICHAEL & CO. *v.* THE LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.

Insurance (Marine)—Mutual Insurance Association—Construction of Rules—Damage to Cargo by "improper Navigation"—Negligence—Insufficiently-closed Port.

By the articles of a mutual insurance association the members agreed to indemnify each other against losses, damages, and expenses arising from or occasioned by any loss or damage of or to any goods or merchandize caused by "improper navigation of the ship carrying the goods," for which any such member might be liable.

A cargo of wheat was shipped on board a vessel belonging to the plaintiffs, who were members of the association. During the loading of the cargo an opening or port in the side of the vessel was by the negligence of persons employed by the plaintiffs insufficiently secured, so that during the voyage water leaked in and damaged the wheat in the lower hold, and the plaintiffs became liable to pay and paid compensation to the owners of the cargo. The leak did not hinder or impede the navigation of the vessel in the course of her voyage :—

Held, affirming the judgment of the Queen's Bench Division, that this was a damage arising from "improper navigation of the ship," within the articles of association, for which the plaintiffs were entitled to recover.

Special Case stated for the opinion of the Court.

The plaintiffs were owners of an iron sailing-ship called the *Argo*, which was entered on the books of the defendants, an association of sailing-ship owners, who agreed to indemnify each other, under their articles and rules, against losses, damages, and expenses for which any of them might be liable in respect of any ship duly entered on the books of the association, arising from or occasioned by (amongst other matters) any loss or damage of or to any goods or merchandize "caused by improper navigation of the ship carrying the goods or merchandize or of any other ship (but not from damage caused by bad stowage)."

In October, 1882, a cargo of wheat in bags was shipped in the *Argo* at San Francisco in good order and condition, and carried to Liverpool and discharged there. The voyage was performed in the ordinary manner and in safety in all respects, save as hereinafter appears.

The wheat on being discharged at Liverpool was found to be damaged by salt water; and it was admitted, for the purposes of

this case, that the water got into the ship and consequently into the cargo in the manner hereinafter described.

The cargo was in part taken on board through an opening or port made for this purpose in the side of the ship above the 'tween-decks. When part of the wheat was on board, and before the loading was completed, this opening was closed in the ordinary way by means of an iron door or shutter fitted for the purpose on the outside of the ship on hinges. When shut, it is made fast by bolts passing through iron bars on the inside of the ship, and screwed up by nuts on the inside. The joint between the ship's side and the overlapping flange of the door is made tight by smearing the flange with a mixture of white or red lead and oil before the door is shut.

The port through which cargo was taken on the voyage in question was not closed efficiently, the joint between the flange of the door and the ship's side not being perfectly tight, and, as the port was below the water-line, some water leaked in. The defect in the joint was due to negligence on the part of persons employed by the plaintiffs. The water which thus leaked in damaged part of the cargo in the lower hold, and the plaintiffs in consequence became liable to pay and paid 450*l.* compensation to the owners in respect of the damage. They also justifiably incurred expenses amounting to 75*l.* 5*s.* 2*d.* in connection with the claims of the cargo-owners.

The leak did not endanger the ship, nor did it hinder or impede the navigation of her in the course of her voyage.

The question for the opinion of the Court was, whether the plaintiffs were under the articles and rules entitled to be indemnified by the defendants in respect of the compensation so paid.

1886. Dec. 13. *Kennedy, Q.C.*, (*Squarey*, with him), for the plaintiffs. The negligence of the persons employed by the plaintiffs to put the cargo on board, in not properly securing the port, was "improper navigation" within the articles of the association. In the case of *The Warkworth* (1), it was held by Butt, J., that the words "improper navigation" in the Merchant Shipping Act

(1) 9 P. D. 20.

1887

CARMICHAEL v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.

Amendment Act, 1862 (1), are not to be restricted merely to the negligent management of a vessel by her master and crew, but include faulty navigation arising from the negligence of any person who has been employed by the ship-owner in the construction, overlooking, or management of the ship; and this decision was affirmed on appeal. (2) In *Laurie* v. *Douglas* (3), whilst a vessel was discharging her cargo in the Commercial Docks, a rope by which she was moored to the quay broke, and in consequence she canted over, and water got in through her ports and damaged part of the goods which were still on board; and this was held to be a loss within the exception in the bill of lading of "all and every the dangers and accidents of the seas and navigation."

Closing the port is for the purpose of navigation as much as closing the sea-cock in *Good* v. *London Steamship Owners' Association* (4): the character of the act in both cases is the same. The improper state of the ship continues throughout the voyage.

Carver (*Cohen, Q.C.*, with him), for the defendants. Under the articles of the association the indemnity is limited to damage caused to goods by reason of improper navigation of the ship. "Improper navigation" must be taken in its ordinary natural sense,—negligence in the management of the ship in the course of a voyage. Here, the improper act which resulted in damage to the cargo, viz. the omission properly to close the inlet port, occurred before the commencement of the voyage.

Steel v. *State Line Steamship Co.* (5), *Hayn* v. *Culliford* (6), and *Tattersall* v. *National Steamship Co.* (7), are distinct authorities to shew that damage arising from an act like this, done before the commencement of the voyage, is not within the ordinary exception of the "dangers and accidents of the sea." The meaning of the words used in these articles of association cannot be extended beyond damage to cargo caused by negligence in the management of the ship in the course of the voyage.

Kennedy, Q.C., in reply.

(1) 25 & 26 Vict. c. 63, s. 54, subs. 4.
(2) 9 P. D. 145.
(3) 15 M. & W. 746.
(4) Law Rep. 6 C. P. 563.
(5) 3 App. Cas. 72.
(6) 3 C. P. D. 410; 4 C. P. D. 182.
(7) 12 Q. B. D. 297.

1887

CARMICHAEL v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.

A. L. SMITH, J. This is an action by shipowners against an association of shipowners at Liverpool, in respect of two heads of claim, viz. for compensation which the insured became liable to pay to the owners of the cargo for damage to their goods, and for expenses incurred by the plaintiffs in respect of that claim. The question which we have to determine is, what is the true meaning of the articles of association by which the members have agreed to indemnify each other against losses, damages, and expenses for which any of them might be liable in respect of any ship entered on the books of the association arising or occasioned by (amongst other things) any loss or damage of or to any goods or merchandize caused by *improper navigation* of the ship carrying the goods or merchandize, or of any other ship. I think no one of the cases throws any light upon the meaning of the articles of association except *Good* v. *London Steamship Owners' Association.* (1) The cases which arise upon bills of lading do not assist us. The plaintiffs stand in the place of the owners of the goods. They contracted with the association for indemnity against certain losses or damages arising to goods during the voyage: and the question is whether they can make out that the loss or damage in respect of which they claim to be indemnified was caused by improper navigation of the ship. The words upon which the question in this case turns are these,—"caused by improper navigation of the ship carrying the goods or merchandize, or of any other ship, but not for damage caused by bad stowage." The indemnity is quoad the goods, not the ship. Assume that the ship sails with the cargo on board, but with her hatches open, and in consequence sea-water gets into the hold and damages the goods,—could it be said that that was not a damage caused by improper navigation of the ship? In my judgment it could not. The damage to the cargo here was caused by the negligence of the persons employed by the plaintiffs to put it on board. It was in part taken on board through an opening or port in the side of the ship below the water-line, which port was closed before the loading was completed, but so inefficiently that the joint between the flange of the door or shutter and the side of the ship was not made water-tight,

(1) Law Rep. 6 C. P. 563.

1887

CARMICHAEL v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.

and so water got in and damaged the cargo in the lower hold. Can it be said under these circumstances that the ship was otherwise than improperly navigated? It is true that this negligence took place before the ship started on her voyage: but the defective closing of the port continued throughout the voyage quoad the cargo. The case of *The Warkworth* (1) is no authority upon this point: but I am unable to distinguish the present case from *Good* v. *London Steamship Owners' Association.* (2)

WILLS, J. I am of the same opinion, although during the argument of this case I have not been free from doubt arising from the difficulty of trying to reconcile the language of these articles of association with that of an instrument which rests upon totally different considerations. There seems to be a singular dearth of authority upon the point. We must, therefore, endeavour to make out from the instrument itself what it means. I think it was intended by the article in question to indemnify the shipowner against loss or damage to goods caused by improper navigation of his own or of any other ship: it is not confined to cases where the damage has arisen from his own negligence or that of his servants. It is no argument to say that the plaintiffs are seeking to protect themselves against the consequences of their own neglect in sending the ship to sea in an inefficient state: we must, therefore, altogether discard the element of negligence. The only case which is at all germane to the matter is *Good* v. *London Steamship Owners' Association* (2), which puts a liberal construction upon the words "improper navigation." Improper navigation is not confined to the voyage: it embraces acts done anterior to the voyage which render the ship unfit to carry the cargo. The only distinction I can discover between that case and the present is, that there the cause of damage was something which arose in the course of the voyage, whereas here it was the result of an act of negligence committed by the owners' servants before the commencement of the voyage. The framer of these articles evidently had not a distinction so fine present to his mind when he drew them. My Brother Smith has suggested an illustration which I entirely adopt, viz. that of a ship sent to sea

(1) 9 P. D. 20 and 145. (2) Law Rep. 6 C. P. 563.

with open hatches, whereby damage was done not to the ship but to the cargo. Could the ship under such circumstances be said to be properly navigated? Clearly not. Now, what sensible difference is there between sending a ship to sea in such a condition as that and sending her upon a long voyage with a hole in her side below the water-line which is insufficiently closed? The consequences in both cases are the same. I cannot help thinking, that the construction which mercantile men would consider the proper construction to be put upon this contract would be that it is improper navigation to send a ship to sea with an insufficiently closed port-hole. There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

J. S.

The defendants appealed.

1887. May 19. *Cohen, Q.C.*, and *McCall*, in support of the appeal.

Bucknill, Q.C., and *J. P. Aspinall*, for the plaintiffs were not called on.

LORD ESHER, M.R. The question must be: what is the interpretation to be put on the words "caused by improper navigation." It seems to me that they do not refer simply to improper navigation with regard to the ship herself, but also to improper navigation with regard to the safety of the goods in the ship. Secondly, what is the meaning of improper navigation? I think that must imply something wrongly done, or wrongly omitted to be done by the shipowner, or those for whom he is responsible, at some time or other. If neither the shipowner, nor any of his servants, nor persons for whom he is liable do anything improper at any time, I cannot say I think any liability could arise under this clause. They ought not to be negligent, and if by negligence they do something they ought not to do, or do not do something which they ought to do they have acted improperly. That negligence must have effect on the navigation of the ship while she is being navigated. You cannot have improper navigation except with regard to something happening while the ship is being

1887

CARMICHAEL v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.

Lord Esher, M.R.

navigated. Now comes this question: If something is negligently done or omitted to be done before the navigation of the ship begins, which has an effect on her navigation while she is being navigated, is that or is that not improper navigation within the meaning of these words? There is no ruling which will bind a Court of co-ordinate jurisdiction, or this Court; still two persons of greater authority in mercantile law, and in the construction of mercantile documents, and with regard to mercantile business than Willes, J., and Montague Smith, J., could hardly be found. Now I take it if you look at the principle laid down by them in *Good* v. *London Steamship Owners' Association* (1), it will help much to the construction of this article here—not by way of ruling but by way of assistance. I cannot help thinking that the principle laid down by them, although the words are confined to bad stowage, may be easily enunciated with regard to something other than that stowage in a way I suggested during the argument. I should say that if counsel, therefore, had put his question in these terms: "Would negligence arising before the commencement of the voyage be within this deed?" the judges would have said, "Certainly if that negligence affected the safe sailing of the ship with regard to the safety of the goods on board during the voyage." That seems to me to be a very sound answer to the question. I think, therefore, that if there be negligence before the navigation of the ship commences—negligence of the owner, or his servants—which has the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that makes the navigation under those circumstances improper navigation by the shipowner or those for whom he is liable. Here there was negligence before navigation commenced—I purposely say navigation instead of voyage, because there might be navigation without any voyage at all. Here the negligence commenced before the navigation of the ship commenced—but it was negligence of the shipowner and of those for whom he was responsible, and it had the effect that it rendered it impossible, unless that matter were found out and put right, to navigate that ship, after her navigation had begun, safely with regard to the safety of the goods.

(1) Law Rep. 6 C. P. 563.

Under those circumstances it seems to me that the damage was caused by improper navigation within the meaning of the rule, and that the judgment of the Divisional Court was right.

FRY, L.J. I am of the same opinion. We have to construe the words "improper navigation of the ship," with reference to the loss or damage of or to any goods or merchandise carried by the ship.

Now the facts are shortly that the port-hole in this ship, through which a large portion of the cargo was brought on board, was closed in the ordinary way before the loading was complete by an iron door or shutter, and it was by reason of the negligence of persons employed by the plaintiffs, who inefficiently closed it, that water came through it in the course of the voyage, and thereby injured the cargo. The question is whether that was improper navigation. In my judgment it is.

Without attempting to define all the cases which may come within the words "improper navigation," I think those words as used in this rule do include every case where something is omitted to be done which ought to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried.

Now it has been contended that the words do not include this case for two reasons. In the first place, it has been said that the omission of some act must be during the course of the voyage; that is, after the ship has commenced her voyage, and before she has ended it, and that navigation does not include anything happening before or after those two points of time. In my judgment it is impossible reasonably to contend that omission to do a proper act before the commencement of a voyage which results in bad sailing and injury to the ship during the course of the voyage is not improper navigation.

Take the case put during the course of the argument of a ship's captain omitting to take on board a compass (an act which must be done, and which is usually done before the commencement of the voyage) that leads to the ship losing her way on the

1887

CARMICHAEL v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.

FRY, L.J.

ocean, and ship and cargo being brought to destruction. It can hardly be contended, in my judgment, that there is not improper navigation, although the captain during the course of the voyage may have done everything which a human being could do without a compass. That is a case therefore in which the omission of a proper act is before the commencement of the voyage, but its result is damage during the voyage. That was the view of the Common Pleas Division in the case of *Good* v. *London Steamship Owners' Association.* (1) They considered that case (and there is an obiter dictum of much value), a case of bad stowage before the commencement of the voyage affecting the sailing of the ship after the voyage commenced, and they considered that would be bad navigation.

The second point urged on us is this. It is said navigation only refers to the transit of the ship through the water without regard to the cargo she carries. Whatever may be the truth of that contention in some cases, it seems to me impossible to apply it to the present case, in which we are considering loss and damage to goods caused by improper navigation. I think, therefore, we must have regard to the cargo carried. I think that navigation, in this context at any rate, relates to carriage of the goods by a ship through the water from terminus a quo to terminus ad quem. There again the conclusion at which I have arrived receives confirmation from the case of *Good* v. *London Steamship Owners' Association* (1), because the thing which was held there to be improper navigation was the negligence in closing a cock which let water in to the injury of the cargo, and, as far as I see, it was not shewn that the admission of water would have interfered with the mere transit of the hull of the ship from one place to another.

I think, therefore, that the two arguments which have been addressed to us in order to induce us to say that the words do not include the act in question fail.

One way in which the question may be approached is this: What is proper navigation? Can it be said that proper navigation does not include making proper preparations for navigation, and that proper navigation does not include taking on board a

(1) Law Rep. 6 C. P. 563.

compass and anything else necessary for the proper condition of the ship after she has sailed? I should hesitate so to lay down. At any rate I am clear that in this case, having regard to the words we have to construe, that negligent omission by the plaintiffs has led to improper navigation.

LOPES, L.J. In this case it is assumed that there was no negligence after the commencement of the voyage, and the case depends on what is the true construction and meaning of the rule. The important words are "improper navigation," and the Court has to determine what is the meaning of improper navigation. In my opinion improper navigation means the improper management of a ship in respect of the cargo (and this was a cargo carrying ship) during the voyage. Then it is said that any negligence before the commencement of the voyage is not contemplated or contained in the words "improper navigation," but that it must be some act done or omitted during the voyage. Now I cannot adopt that view. It appears to me that any negligence before the commencement of the voyage which results in bad management of the ship in respect of the cargo during the voyage is improper navigation within this rule, although the course of the vessel is in no way impeded or hindered. During the course of the argument the case was put with regard to sending a ship to sea without a compass, and it was admitted that although that was an omission and negligence before the commencement of the voyage it would come within the terms of such a rule and be improper navigation. I am unable to draw any distinction in principle between that case and this. Here the damage was caused by the port being imperfectly closed at the commencement of the voyage whereby during the voyage the cargo was injured. In my opinion that comes within this term, and I think the decision of the Court below was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for both parties: *Gregory, Rowcliffes, & Co., for Hill, Dickinson, Lightbound & Dickinson,* Liverpool.

A M.

1887
Feb. 21;
April 6.

IN THE MATTER OF A PARLIAMENTARY ELECTION FOR THE SOUTH-EASTERN DIVISION OF ESSEX.
EX PARTE THE RETURNING OFFICER.

Parliament—Parliamentary Election—Returning Officer's Charges—Taxation of—Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 *Vict. c.* 84)—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33).

At a parliamentary election the high sheriff was the returning officer, the duties being performed on his behalf by a firm of solicitors, one of whom was under-sheriff. The returning officer's charges included a charge for professional assistance rendered to him by the under-sheriff's firm, which was disallowed on taxation, on the ground that no detailed account was sent in to the returning officer within fourteen days of the return, as required by s. 5 of the Returning Officers Act, 1875:—

Held, that the charge was wrongly disallowed on the above ground, the section not being applicable, as between the returning officer and the candidates, to charges made for work done for the returning officer by his own agents.

The right of a returning officer under s. 2 of the same Act to be paid his reasonable charges and expenses is not limited to such charges only as have been vouched under ss. 4 and 5 of the Act, nor is a charge made by him to be disallowed merely because in the account sent in by him to the candidates it appears under a wrong heading.

A returning officer is not limited to charging for such services and expenses as come verbatim et literatim within the descriptions in the schedule to the Act, if they are services and expenses of one of the kinds mentioned in the schedule. A charge for storing ballot-boxes from one election to another in order to avoid the expense of procuring fresh ones was therefore allowed, although no such charge is expressly provided for in the schedule to the Act.

MOTION to review the certificate of a master confirming a taxation by a county court judge of the costs and charges of the returning officer in a parliamentary election for the South-Eastern Division of Essex, and to allow the appeal of the returning officer from such taxation.

At the election, which was contested, the high sheriff of the county was the returning officer, but the work was done for him by Messrs. Gepp & Sons, who were solicitors at Chelmsford, one of the members of which firm was the under-sheriff. The return to the writ of election was made on July 15, 1886, and on August 5 a copy of the returning officer's account was sent to the agents of the candidates by Messrs. Gepp & Sons; the agents gave notice to Messrs. Gepp & Sons to tax the bill, and

the taxation took place on September 27 before the county court judge, the sum of 240*l.* 14*s.* 2*d.* being eventually taxed off the amount of 547*l.* 6*s.* 8*d.* claimed in the bill. It is unnecessary here to set out in detail the items disallowed, many of them being mere matters of taxation and of the discretion of the taxing officer; the remaining items all fall within one of the four following classes.

The first class consisted of items which were not vouched in detail under s. 4 or s. 5 of the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84). This included several items, but it will be sufficient to give one as an illustration. Of a charge of 2*l.* 2*s.* for preparing and publishing the notice of election, vouchers were produced for the printer's bill of 12*s.*, and the bill-poster's of 5*s.*, and these sums were allowed; but the balance of 1*l.* 5*s.*, which represented the remuneration of the under-sheriff for drawing and preparing the notice, was disallowed, as no vouchers were forthcoming.

The second class comprised items which were not included eo nomine in the schedule to the Returning Officers Act, 1875, under which head came a charge of 30*s.* for storing twenty-four ballot-boxes from the previous election; this was disallowed as unauthorized by the schedule, although by it the returning officer was entitled to charge 1*l.* 1*s.* for each ballot-box required to be purchased, or 5*s.* for each one required to be hired.

In the third class were items which were charged for under the wrong heading of expenses, though they might have been allowed if they had appeared under their proper heading. For instance, posters containing extracts from the Act of Parliament, and placards giving directions and notices to the voters were provided for each polling-station, and these were charged for under the head "constructing a polling-station with fittings;" the items were disallowed on the ground that the posters, &c., were not fittings. The judge thought that the amount might properly be charged under the head of "other expenses," but the maximum amount allowed under this head having been already nearly reached, the practical effect of his decision was to tax almost the whole of this amount off the bill.

In the fourth class were a charge of 26*l.* for the preparation

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

and publication of notices other than the notice of election, and one of 46*l.* for professional and other assistance in and about the conduct of the election, the amount charged being in each case the maximum allowed by the schedule to the Act of 1875. No separate account of these charges was sent in by the under-sheriff to the high sheriff, but they were merely included in the account sent by the under-sheriff to the candidates, and both the items were wholly disallowed on the ground that detailed particulars of the claims had not been transmitted to the returning officer within fourteen days after the day of the election, as required by s. 5 of the Act of 1875.

Upon appeal by the returning officer against the taxation under 49 & 50 Vict. c. 57, s. 1, the prescribed taxing officer of the High Court confirmed the certificate of the county court judge as to the taxation, and dismissed the appeal, giving no reasons for his decision.

By s. 2 of the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), "The returning officer at an election shall be entitled to his reasonable charges, not exceeding the sums mentioned in the first schedule to this Act, in respect of services and expenses of the several kinds mentioned in the said schedule, which have been properly rendered or incurred by him for the purposes of the election . . . . A returning officer shall not be entitled to payment for any other services or expenses, or at any greater rate than as in the said schedule mentioned, any law or usage to the contrary notwithstanding."

By s. 4: "Within twenty-one days after the day on which the return is made of the persons elected at the election, the returning officer shall transmit to every candidate or other person from whom he claims payment either out of any deposit or otherwise of any charges in respect of the election, or to the agent for election expenses of any such candidate, a detailed account shewing the amounts of all the charges claimed by the returning officer in respect of the election, and the share thereof which he claims from the person to whom the account is transmitted. He shall annex to the account a notice of the place where the vouchers relating to the account may be seen, and he shall at all

reasonable times and without charge allow the person from whom payment is claimed, or any agent of such person, to inspect and take copies of the vouchers."

By s. 5, "Every person having any claim against a returning officer for work, labour, materials, services, or expenses in respect of any contract made with him by or on behalf of the returning officer for the purposes of an election, except for publication of accounts of election expenses, shall, within fourteen days after the day on which the return is made of the person or persons elected at the election, transmit to the returning officer the detailed particulars of such claim in writing, and the returning officer shall not be liable in respect of anything which is not duly stated in such particulars."

Channell, Q.C., and *W. Wightman Wood*, for the returning officer. The under-sheriff's charges are recoverable against the candidates, although they were not as a fact sent in to the high sheriff at all. Section 5 of the Act of 1875 is for the protection of the returning officer, and the course pursued in sending the under-sheriff's charges direct to the candidates was done with the returning officer's concurrence, and affords no ground of complaint to the candidates. None of the accounts of charges were sent in to the high sheriff as returning officer: they were sent in to his deputy, the under-sheriff, and it was quite unnecessary for the latter to make out a separate claim for his own charges and to serve himself with it as the returning officer's agent.

The provision in s. 4 of the Act of 1875, that the returning officer shall annex to the account a notice of the place where the vouchers are to be seen only applies to cases where there are vouchers, and does not make the production of vouchers in every case a condition precedent to the right of the returning officer to recover from the candidates charges properly incurred and paid by him.

"Fitting up" a polling-station includes that which is necessary for enabling the presiding officer to perform his duties, and not merely structural fittings.

G. Harris Lea, for the unsuccessful candidate. The language of s. 5 of the Act of 1875 is absolute, and the under-sheriff cannot

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

charge for his own services unless he sends in an account to the returning officer and produces a voucher: he is in the same position as any other person having a claim against the returning officer.

Edward Pollock, for the sitting member. Either the under-sheriff was the returning officer under s. 8 of the Ballot Act, 1872, or he was a person acting under a contract with the returning officer. If he was the returning officer he cannot charge for his own professional services, but only for professional assistance rendered to him; he cannot make a charge in respect of his own knowledge, and so make a profit out of the election, but only for the expenses to which he is actually put. If he is not the returning officer, but is employed by him under a contract, he comes under s. 5 of the Act, and must send in to the returning officer an account of his charges.

Cur. adv. vult.

April 6. The judgment of the Court (Denman and Mathew, JJ.) was delivered by

DENMAN, J. This was an appeal under 49 & 50 Vict. c. 57, s. 1, from the master's review of the taxation by the County Court Judge of Essex of the sheriff's charges as returning officer in respect of a parliamentary election for the South-Eastern Division of Essex. The sheriff objects to the disallowance of certain charges. The two candidates insist upon the correctness of the master's decision, which confirmed the taxation of the county court judge in all respects, but did not go into any details or give any reasons. The county court judge delivered a judgment in which he gave his reasons for the various disallowances complained of. It is not necessary to enter into these in detail. The principal ground of his decision appears to have been that several of the items charged in the returning officer's account sent in to the candidates were charges for services rendered by the under-sheriff for the sheriff, the returning officer, and not vouched in detail or dissected in the account sent in so as to enable the candidates, or their election agents, by inspection of the account, and subsequently of the vouchers, to see whether the charges were reasonable or otherwise. The total amount charged to the

candidates, viz., 547*l.* 6*s.* 8*d.*, was within the limit allowed by statute, but from this amount the sum of 240*l.* 14*s.* 2*d.* was disallowed by the county court judge, part, as was admitted, rightly, part, as was contended, improperly. Before dealing with the particular items in dispute it will be desirable to refer to the enactments bearing on the case.

The duties of the returning officer are now prescribed in various clauses of the Ballot Act (35 & 36 Vict. c. 33). Amongst other things, he is, by s. 8, to provide nomination-papers, polling-stations (with the right, by s. 6, of using schoolrooms, &c., making good any damage or expense on account of their being so used), ballot-boxes, ballot-papers, &c., and pay such officers, and do such other things as may be necessary for effectually conducting the election. By the same section it was provided that all expenses properly incurred in carrying into effect the provisions of that Act should be payable in the same manner as expenses incurred in the erection of polling-booths were then by law payable (that is to say, ultimately by the candidates in equal proportions), and a power is given to the sheriff to appoint in writing a deputy (which was not done in this case), and it is provided that every such deputy and also any under-sheriff shall, in so far as he acts as returning officer, be deemed to be included in the term "returning officer." In the present case there was no appointment of the under-sheriff in writing so as to make him a deputy-sheriff, but he did a great part of the work for which the sheriff charges the candidates in the account sent in.

In the rules contained in the schedule to the Ballot Act the duties of the returning officer are prescribed in considerable detail. He is by rule 1 to give notice of the time and place of proceeding to the election. He is also to give notice of the poll by rule 9. By rule 11 he is to placard the building in which the election is to take place with the names of those nominated. By rule 15 he is to provide polling-stations, and by rule 16 to furnish them with a certain number of compartments, and by rule 19 to give public notice of the situation of the polling-stations and the description of the voters who are to vote at each, and of the mode in which they are to vote.

The above enumeration is sufficient to illustrate the nature of

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

Denman, J.

those duties of the returning officer, which necessarily involve some expenditure on his part, beyond the merely personal duties which he is called upon to perform by himself or others. By rule 46 it is provided that where he is required by the Act to give any public notice he may do so by advertisements, or placards, or handbills, or such other means as he thinks best calculated to afford information to the electors.

These being the duties of the returning officer since 1872, the legislature in 1875 passed the Act upon which the questions discussed before us mainly depend. It is the 38 & 39 Vict. c. 84, and is called in the preamble, "An Act to regulate the expenses and control the charges of returning officers at parliamentary elections."

By s. 2 it provides that the returning officer "shall be entitled to his reasonable charges, not exceeding the sums mentioned in the first schedule to the Act, in respect of services and expenses of the several kinds mentioned in the said schedule, which have been properly rendered or incurred by him for the purposes of the election." This section does not limit the right of the returning officer to be paid, to such charges only as have been vouched under ss. 5 or 4 afterwards referred to. The section further enacts that "a returning officer shall not be entitled to payment for any other services or expenses, or at any greater rates than as in the said schedule mentioned." The schedule which follows contains twenty-two different headings with the maximum charge to be allowed for each. Amongst these are the following, which bear upon the charges now in dispute: "For constructing a polling-station, with its fittings and compartments, 7*l.* 7*s.*" "For each ballot-box required to be purchased, 1*l.* 1*s.*" "For the use of each ballot-box when hired, 5*s.*" Then follow certain specified maximum charges for stationery at the polling-stations, for printing and providing ballot-papers, per thousand, for stamping-instruments (to make the official mark on the ballot papers), and for copies of the register. Then follow the two headings, in which the two most important items in question in this case are described as follows: first, for the preparation and publication of notices (other than the notice of election, for which last-mentioned notice two guineas had already been

prescribed in the schedule as the maximum charge) "not exceeding for the whole of such notices 20*l.*, and 1*l.* for every additional 1000 electors above 3000." Secondly, "for professional and other assistance in and about the conduct of the election. In a contested election not exceeding 25*l.* and an additional 3*l.* for every thousand electors above 3000, etc. In an uncontested election one-fifth of the above sums." The last item in the schedule is: "For all other expenses, in a contested election, not exceeding 10*l.* and an additional 1*l.* for every 1000 electors above 1000; in an uncontested election nil."

A perusal of the above enactments leads to the conclusion that whereas on the one hand the legislature intended to protect candidates from unreasonable demands of returning officers, on the other hand, it had a regard to the increased duties which the Ballot Act had thrown upon those officers, and intended that for all actual expenditure reasonably necessary for the conduct of the election (to be ascertained in case of objection by taxation) the returning officer should be indemnified: subject only to this, that a maximum charge was specified in the schedule beyond which the candidates should not be liable, even though such maximum charge might not be sufficient to reimburse the returning officer for his expenses in respect of the particular class of expenditure the maximum charge for which was specified in the schedule. For example, supposing the returning officer, however reasonably, owing to the difficulty of deciding questions of law raised during the election, were to render himself liable to hundreds of pounds beyond the sum mentioned in the schedule as the maximum "for professional and other assistance in and about the conduct of the election," he would be limited to the maximum in any claim he would have against the candidates, and each candidate would only be liable to his aliquot portion of the maximum charge. But as long as the returning officer only makes his claim for such kinds of services and expenses as are of the kinds enumerated in the schedule, and also both reasonable and within the maximum, and "have been properly rendered or incurred by him for the purpose of the election," he is by the very terms of s. 2 of the Act of 1875 entitled to such charges, to be paid by the candidates in equal shares. He is "not entitled

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

Denman, J.

to payment for any other services or expenses or at any greater rates than as in the schedule mentioned." That is to say, he is not entitled to any unreasonable charge, or to any charge in respect of services or expenses different in kind from those mentioned in the schedule, nor for services or expenses which have not been properly rendered or incurred for the purposes of the election.

We do not think that the legislature intended to enact that no possible service or expense rendered or incurred by the sheriff should be payable by the candidates merely because it does not come verbatim et literatim within the several descriptions in the schedule, provided it be a service or expense of one of the kinds mentioned.

This appears to us to be sufficient to shew that at least as regards one of the disputed items the county court judge was wrong in disallowing the charge. The facts relating to that item were these. In order to save expense at future elections in purchasing new ballot-boxes or hiring them for the election (for which the maximum charges in the schedule are respectively one guinea and five shillings) the under-sheriff, who is a solicitor, charged the sheriff a much less sum for keeping the old ballot-boxes from one election to another. The amount was disallowed on the ground that the item was one not contained in the schedule. It is not so, eo nomine, but we think it was a service or expense of the kind for which a reasonable sum might have been allowed, and that the master, having the above facts before him, assuming them to be made out to his satisfaction, ought to have allowed the claim.

But much more serious claims or charges as regards amount were disallowed, on the ground that, though claimed in the very words of the schedule, they were not payable by the candidates, because no detailed account of the items composing them had been sent in to the returning officer within fourteen days of the return according to the 5th section of the Act of 1875. These were items 12 and 13 in the account. The first of these was described, as in the schedule, "preparation and publication of notices (other than the notice of election) 26*l*." The other was "professional and other assistance in and about the conduct of

the election 46*l.*" It was not disputed that both these sums were sums for which the sheriff was or might be responsible to the under-sheriff, who was a solicitor. But no account had been sent in to the sheriff by the under-sheriff within the fourteen days for either sum. Whether any specific claim of these two amounts had been sent in to the returning officer within the twenty-one days or not does not very clearly appear from the judgment of the county court judge; but it is clear from that judgment that the learned county court judge decided on a ground which makes it impossible to ascertain this, because in his judgment he gives the exact ground upon which he disallowed the charges as follows:— As to item 12, "I decide that, there having been no transmission to the returning officer of the detailed particulars in writing of this claim within the fourteen days specified (i.e., in s. 5) by Messrs. Gepp & Sons as the persons claiming for work and labour, &c., against the returning officer, in compliance with the terms of s. 5 of 38 & 39 Vict. c. 84, this item must be disallowed."

It may be assumed for the present purpose, in the absence of anything to the contrary in the learned judge's decision, that this 26*l.* may have been actually paid by the under-sheriff to the several persons entitled, and that it may have been an expenditure within the maximum allowed for the purposes to which it relates, and that the under-sheriff, having paid that amount on behalf of the sheriff, had in his possession vouchers for all the bills going to make up the 26*l.* Still we understand the learned judge's decision to be that the returning officer must himself have received detailed particulars from the under-sheriff, charging him in detail, within the fourteen days, and in default lose any right as against the candidates, though he might have paid the amount to the under-sheriff before sending in his claim against the candidates. We do not so read s. 5 of the Act, nor do we think that the joint effect of s. 4 and s. 5 together is such.

Sect. 5 is primâ facie for the protection of the returning officer. It is, no doubt, also for the protection of the candidates; for the returning officer is not liable to pay for any work, labour, materials, services, or expenses in respect of any contract not duly stated in such detailed particulars. But, if detailed particulars have been sent in to the under-sheriff, and the charges

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

Denman, J.

paid by him for the sheriff within the fourteen days, or even afterwards within the twenty-one days, we find nothing to prevent this from being a compliance with s. 5, inasmuch as the under-sheriff is so notoriously the agent of the sheriff for such matters as bills for services rendered, that the sending of the particulars to him must be looked upon, in the absence of any proof to the contrary, as being a sending of them to the sheriff. Therefore we do not think that the objection upon which the learned judge acted is by any means conclusive against the sheriff's right to recover the 26*l.* in question.

It was said that if the sheriff does not himself receive particulars in detail under s. 5, he cannot under s. 4 transmit the account to the candidates in the shape required by that section. We do not assent to this. The words in s. 4 differ from those in s. 5. The latter requires every person having a claim in respect of work, &c., to send in detailed particulars of such claim (i.e. an account with dates and items and subdivisions of different kinds of work); the former speaks only of a "detailed account shewing the amounts of all the charges claimed" (a very different kind of document, and one not necessarily required to be in more minute detail than by separately charging the several kinds of services and expenses contained under the separate headings in the schedule to the Act). This account is to have annexed to it a notice of the place where the vouchers may be seen.

We think that it would be a perfect compliance with these two sections if the under-sheriff were to pay on behalf of the sheriff all the bills in a detailed account, with particulars, sent in to him within the fourteen days for the matters included in item 12 of the account now in question, and a perfect compliance with the requirements of s. 4 if the sheriff, within the twenty-one days, having paid the under-sheriff 26*l.* for all such items in the lump, were to charge that 26*l.* in the lump to the candidates under the proper head, informing them that the vouchers might be inspected at the under-sheriff's office or elsewhere. We are, therefore, of opinion that the master ought to inquire into the facts relating to this charge, receiving evidence, if necessary, under s. 1 of 49 & 50 Vict. c. 57.

With regard to item 13, the learned county court judge

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

Denman, J.

appears to have decided it entirely on the ground that there could be no claim by the sheriff on the candidates for any payment made by or to the under-sheriff unless within fourteen days a detailed account were sent to the sheriff himself. We have not enough before us to enable us to say to what, if any, extent the charge of 46*l.* is allowable; but we think that the master ought to inquire further into the matter, and if there is any further appeal from his decision, that it ought to come before the Court in the usual form, with the objections and the master's reasons stated as in an ordinary taxation of costs, and not as it was brought before us, with a mere affirmance of the county court judge's decision and a copy of his notes. Other objections were raised before the county court judge and allowed by him, which were in our opinion allowed upon a too rigid construction of the requirements of the Act. He appears to have considered that if, by error, a particular amount is charged under a wrong heading, it was beyond his power to allow it, even though it might be clearly shewn that it was a legitimate expenditure, and duly vouched, and within the maximum, even when added to the charges for similar expenditure made under the proper heading. For instance, there was a question whether, under the heading "For constructing polling-stations with fittings, compartments &c.," a sum of 25*l.* was properly charged for furnishing each polling-station with the necessary placards and some other articles required by the Act to be provided for each polling-station. The county court judge's note does not enable us to see clearly what these articles were, but the ground of his decision appears to have been that they were improperly classed as "fittings" in the account. Assuming that they ought to have been classed otherwise, we do not think that it necessarily follows that they are to be disallowed. If within the description of expenses to be allowed as given in the schedule, and if the whole supply of expenses of the kind was within the maximum and not unreasonable, we think it was within the competency of the county court judge to allow them, even though they were claimed under a wrong heading. We think the master ought now to look into the account on this footing, allowing only so much for each kind of expense or service as is both within the maximum, and

1887

IN RE ELECTION FOR SOUTH-EASTERN DIVISION OF ESSEX.

reasonable, but not disallowing any particular item, if the total of such items is within these limits, merely because it may have been misdescribed and so appear under a different head. On these principles we think that the taxation must be reviewed, the costs to be matter of subsequent application.

Appeal allowed.

Solicitors for the returning officer: *Paterson, Snow, Bloxam, & Kinder, for Gepp & Sons, Chelmsford.*

Solicitors for the defeated candidate: *Brighten & Lemon, for Brighten, Southend.*

Solicitors for sitting member: *Kingsford, Dorman, & Co., for W. Gregson, Southend.*

W. J. B.

1887
May 3.

[IN THE COURT OF APPEAL.]

REID *v.* THE EXPLOSIVES COMPANY, LIMITED.

Company—Liquidation—Master and Servant—Appointment of Manager and Receiver—Discharge of Servants.

The plaintiff was in the service of the defendant company under a contract which provided that his employment might be determined by six months' notice. A manager and receiver was appointed by order of the Chancery Division at the instance of holders of debentures of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new company, and the plaintiff was dismissed without notice. In an action for wrongful dismissal:—

Held, by the Court of Appeal, affirming the judgment of Manisty, J., that the appointment of a manager and receiver operated to discharge the servants of the company and that the defendant could not recover.

APPEAL from the judgment of Manisty, J., on further consideration.

The defendants were a company engaged in the manufacture of dynamite and other explosives, and the plaintiff, who was a chemist, was appointed manager of their works at a salary of 600*l.* a year, subject to the determination of his employment on receipt of six months' notice. The company had issued debentures, and on May 22, 1885, the company being in difficulties, F. Thorn was

appointed by order of the Chancery Division receiver and manager of the business on behalf of the debenture-holders. Immediately afterwards the company went into voluntary liquidation, and on May 28 of the same year F. Thorn and one Nutt were appointed liquidators. The plaintiff had notice of these appointments. Thorn on the day after he was appointed receiver came to the works, and told the plaintiff that his appointment as receiver was to make no difference in the plaintiff's position. The plaintiff accordingly continued to discharge his duty at the salary of 50*l.* a month up to December 17 following, at which time Thorn passed his accounts and was discharged from his office of receiver and manager. The liquidators then carried on the business until January 15, 1886, when a negotiation which had been pending for some time for the transfer of the business to a new company was carried out, and the plaintiff was dismissed without notice. He brought this action for wrongful dismissal, and the case was tried before a jury who, in answer to a question, found that the plaintiff after the appointment of Thorn as manager was not in point of fact in his employment, but continued in that of the defendants. On further consideration Manisty, J., held that the appointment of Thorn as manager and receiver discharged the plaintiff from the defendants' employment, and also that the appointment of the liquidators would have the same effect, and he gave judgment for the defendants. The plaintiff appealed.

McClymont, (*Kemp, Q.C.*, with him) for the plaintiff. A manager is appointed to keep the business going until sale: *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) If such appointment acts as a discharge of the servants they need not remain, and the object of the appointment may be defeated. The appointment of a liquidator in a voluntary liquidation does not act as a dismissal of servants where the business of the company is continued: *In re English Joint Stock Bank* (2); *In re Oriental Bank Corporation, MacDowall's Case.* (3) After Thorn ceased to be manager he remained liquidator, and had power to retain the plaintiff in the service of the company, and did so on the terms of the existing

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 3 Eq. 341.
(3) 32 Ch. D. 366.

1887

REID v. EXPLOSIVES COMPANY.

contract. This was quite reasonable, as the new company were to take over all the contracts of the old, and that would include contracts of service. The discharge of the plaintiff was consequently wrongful, and he is entitled to six months' salary in lieu of notice.

He also cited *Jefferyes* v. *Smith* (1) and *Fripp* v. *Chard Ry. Co.* (2) *Murphy, Q.C.*, and *Witt*, for the defendants were stopped.

LORD ESHER, M.R. In this case the plaintiff was formerly in the employ of the defendants, and has brought an action for wrongful dismissal. The action was tried before Manisty, J., and a jury, and resulted in judgment being entered for the defendants, but it is said that on the findings of the jury the judgment should be entered for the plaintiff, or at least that there should be a new trial.

The plaintiff was in the employment of the defendants on a contract, one of the terms of which was that he should have six months' notice. The company got into difficulties, and the Chancery Division, at the instance of the debenture-holders, appointed Thorn receiver and manager of the business. He carried on the business, and allowed the plaintiff to continue his services at the same rate of pay. The company afterwards went into voluntary liquidation, and Thorn and another person were appointed liquidators. At that time Thorn, being still receiver and manager under the order, filled two capacities in relation to the defendants. On December 17 his status as receiver came to an end, and from then to January 15 he acted as liquidator. During this later period the plaintiff, no doubt with the consent of Thorn, went on performing the same duties as he had discharged from the beginning. At that time an agreement had been made for the sale of the business to a new company, and this took effect on January 15. The plaintiff was dismissed, and he has brought his action for not at that time receiving six months' notice. If he succeeded, he would be entitled to six months' pay as his highest damages, subject to reduction. The jury found in favour of the plaintiff, but the learned judge has decided that the service of the plaintiff under Thorn as manager

(1) 1 Jac. & W. 298. (2) 11 Hare, 241.

and receiver could not be treated as a continuance of his service to the company. He afterwards came to the same conclusion as to the effect of the appointment of Thorn and Nutt as liquidators. Both these rulings have been challenged, and we have to consider what is the legal effect on a contract such as that between the plaintiff and the company of the appointment of a manager and receiver by the Court at the instigation of debenture-holders or mortgagees. If there were one mortgagee of a business he might, on the failure of the mortgagor to comply with the terms of the mortgage agreement, take possession of the business. What would be the effect of that on the servants of the mortgagor who had contracts entitling them to notice of dismissal? Would the fact of the mortgagee taking possession be equivalent to dismissal by the mortgagor? We have tried to test that by the case of an employer who has servants in the same position and who shuts up his business. That would amount to a wrongful dismissal, and would give the servants a right of action. So the fact of a mortgagee taking possession of the business of the mortgagor would be equivalent to a dismissal of the servants, and as this would occur by the default of the mortgagor, it would be a wrongful dismissal and would give a right of action. Is the result different when a receiver or manager is appointed by the Court on behalf of a great number of mortgagees? In that case, in order to avoid the difficulty of a number of mortgagees acting independently, the Court acts on behalf of all, and appoints a manager in the interest of all, but the effect is the same as in the case of a single mortgagee who takes possession. It seems to me, therefore, that the result of such an appointment is to discharge the servants from their service to their original employer, and that, as in the other cases I have put, there is a wrongful dismissal for which an action would lie. I come to the conclusion, therefore, that the plaintiff was entitled at that time to bring an action for breach of the contract of service between himself and the defendants, and if nothing were in the way he might recover in that action. But if from the time when the employment ceased onwards for a period equal to the time agreed on for notice of dismissal, he has had employment of equal value to that which he has lost, he has sustained no damage. That is

1887

REID v. EXPLOSIVES COMPANY.

Lord Esher, M.R.

the case here. The plaintiff was taken on by Thorn to do the same service at the same salary, and that was continued for more than six months, consequently he suffered no damage by the wrongful dismissal at the hands of the defendants, and could not be entitled to recover.

The learned judge has come to the conclusion that even if there had been no appointment of Thorn as manager the appointment of the liquidators would have had the same effect. I do not consider it necessary to consider this question. So long as Thorn was manager he could not make a new contract of service with the plaintiff on behalf of the company. He held two distinct positions, and as long as the business was in his hands as manager he could not as liquidator appoint any one. But it is said that on December 17 his character as manager ceased, and it is suggested that at that time he was in a position to make a new contract with the plaintiff on behalf of the company, and that he did so. Manisty, J., came to the conclusion that he could not. I venture to doubt this view, because a liquidator in a voluntary liquidation need not be appointed by the Court at all. His appointment in such a liquidation is not an appointment hostile to the liquidating debtor or company. It seems to me he might well be treated as an agent with certain duties under statutory authority, and that would seem to shew that he might make contracts. I am not prepared to say that the liquidator might not have agreed with the plaintiff in such a way as to entitle him to six months' notice. It is not, however, necessary to say whether he could do this, for the question arises did he do it? This point was not left to the jury, but we have all the materials before us and have authority to draw from the facts the proper inference. The business was to be sold to a new company, and it is plain that it would have been a strange dereliction of duty had the liquidator bound the old company to give the plaintiff six months' notice. From all the circumstances of the case, it would not be reasonable to draw the inference that there was such a new contract, and consequently the legal point does not arise.

In any view of the case it seems to me that the plaintiff has no right of action against the company, and therefore the appeal must be dismissed.

FRY, L.J. I am of the same opinion. It appears that by the agreement made with the plaintiff he was to be entitled to six months' notice. It also appears that the company issued debentures which may be described as mortgages of all their property including the business, and circumstances arose under which the mortgagees had a right to enter upon the property. In the case of a single mortgagee he has the right to enter in consequence of his legal title; in the case of more than one, where there are no priorities but all have a right to enter at the same time, there is a difficulty, which is increased where the property mortgaged is a business. To meet this difficulty, the Court of Chancery has increasingly of late years, at the instance of mortgagees of this description, appointed not merely receivers but managers. That was done in this case. I am not prepared to lay down that every entry by a mortgagee is a dismissal of the servants of the mortgagor from his employment. I think to see whether that has happened we should look to the facts in each case. But in the present case I think the facts shew that the entry did determine the service of the plaintiff and was a dismissal, which by the terms of the agreement was wrongful. If nothing further had happened he would have been entitled to bring his action, but under the circumstances, as he was employed in an equally advantageous manner for the whole of the period for which he was entitled to notice, he cannot claim damages. I do not propose to lay down any rule as to what a liquidator may or may not do, for the question does not arise; and as to the suggested new contract, the circumstances seem to me to disprove its existence.

LOPES, L.J. I am of the same opinion. The plaintiff claims damages in lieu of notice. The plaintiff was employed for six months after the appointment of the manager at the same salary as before, and he is not therefore entitled to recover in this action if in fact the appointment of manager operated to discharge him. I think it did so, and that the decision of the learned judge on this point was right, and should be affirmed.

Appeal dismissed.

Solicitor for plaintiff: *J. O. Jacob.*

Solicitor for defendants: *Saunders, Hawksford, Bennett, & Co.*

A. M.

1887
June 16.

DARENTH MAIN VALLEY SEWERAGE BOARD *v.* GUARDIANS OF THE POOR OF DARTFORD UNION.

Local Government Acts—Local Authority—Joint Board—Component Districts—Expenses of carrying out Provisional Order—Apportionment of Contributions—"Special Expenses"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 229, 230, 283, 284.

A provisional order of the Local Government Board, confirmed by a local Act, provided that the expenses incurred by the joint board for the district should be defrayed out of a common fund, to be contributed by the component districts in manner provided by s. 283 of the Public Health Act, 1875, and that the contributions of certain of the component districts should be contributed and raised as if they were required to defray "special expenses" within the meaning of the Public Health Act, 1875:—

Held, on a special case, that the joint board should apportion the contributions of the component districts according to the rateable values of the properties in such districts, to be ascertained according to the valuation list, and that the rateable values of tithes, tithe commutation rent-charges, land used as arable meadow or pasture ground only, or as woodlands, market gardens, or nursery grounds, or covered with water, or used as a canal or towing path, or as a railway, should be taken at the full value appearing in the valuation list, and not at one-fourth thereof.

SPECIAL CASE.

(1.) The plaintiffs were constituted a joint board within the meaning of the Public Health Act, 1875, by the Local Government Boards Provisional Order Confirmation (Darenth Valley) Act, 1878, for the Darenth Valley Main Sewerage District, with the powers and authorities mentioned in the said Acts and in the provisional order set forth in the schedule to the last-mentioned Act.

(2.) The expenses incurred by the plaintiffs in carrying out their duties were required to be defrayed out of a common fund, to be contributed by the component districts of the Darenth Valley Main Sewerage District (namely the Sevenoaks Urban Sanitary District, the Sevenoaks Rural Sanitary District, and the Dartford Rural Sanitary District) in the manner provided by art. XVI. of the provisional order and s. 3 of the Public Health Act, 1875, and no part of the said districts had been exempted from assessment under s. 7 of the Local Boards Provisional Order Confirmation (Darenth Valley) Act, 1878.

(3.) In pursuance of s. 284 of the Public Health Act, 1875, for the purpose of obtaining payment from the component districts of the sums to be contributed by them towards the expenses incurred by the plaintiffs as aforesaid, the plaintiffs had from time to time issued their precepts to the respective local authorities of such component districts requiring payment of the sums therein mentioned, and such sums had been paid accordingly, with the exception of the sum of 1555*l.* required to be paid by the defendants by the precept of October 12, 1885, which amount came due on February 1, 1886.

(4.) Two other precepts had since been issued, dated respectively April 12, 1886, and October 11, 1886, for 1269*l.* and 1289*l.* respectively, the same being due on August 1, 1886, and February 1, 1887, respectively. Neither of such sums had been paid.

(5.) In apportioning the amount of the expenses of the plaintiffs amongst the component districts for the purpose of issuing the precept of October 12, 1885, the rateable values of the properties in such districts were not all taken upon the same basis, and in no case was the full rateable value of all the property in the district, as appearing in the valuation lists, in force for the time being taken as a rateable value for the purpose aforesaid.

(6.) The question for the opinion of the Court was whether the plaintiffs, in apportioning the amounts of their expenses among the component districts, should do so in proportion to the rateable values of the properties in such districts, such values to be ascertained according to the valuation list in force for the time being, or whether the rateable values of tithes, tithe commutation rent-charges, and land used as arable meadow or pasture ground only, or as woodlands, market-gardens, or nursery grounds, or covered with water, or used as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, should be taken at one-fourth of the rateable values thereof appearing in the valuation lists, or in what other way, and upon what other basis, the apportionments should be made.

(7.) By an agreement in writing dated December 18, 1886, and made between the plaintiffs and the defendants in pursuance of Order XXXIV., r. 6, of the Rules of the Supreme Court, 1883,

1887

DARENTH MAIN VALLEY SEWERAGE BOARD v. GUARDIANS OF POOR OF DARTFORD UNION.

it was agreed that upon the judgment of the Court being given upon the point of law raised by the case, a sum of money to be ascertained in the mode therein mentioned, or in such other manner as the Court might direct, or such other sum as might be ascertained by the Court, should be paid by the defendants to the plaintiffs as therein directed, and that judgment should be entered accordingly for the sums so to be ascertained.

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 283: "Any expenses incurred by a joint board in pursuance of this Act, unless otherwise determined by the provisional order, shall be defrayed out of a common fund, to be contributed by the component districts or contributory places in proportion to the rateable value of the property in each district or contributory place, such value to be ascertained according to the valuation list in force for the time being."

Sect. 284. "For the purpose of obtaining payment from component districts of the sums to be contributed by them, the joint board shall issue their precept to the local authority of each component district, stating the sum to be contributed by such authority, and requiring such authority, within a time limited by the precept, to pay the sums therein mentioned to the joint board, or to such person as the joint board may direct.

"Any sum mentioned in a precept addressed by a joint board to a local authority as aforesaid shall be a debt due from that authority, and may be recovered accordingly, such contribution in the case of a rural authority being deemed to be general expenses.

* * * * * *

"For the purpose of obtaining payment from contributory places of the sums to be contributed by them, the joint board shall have the same powers of issuing precepts and of recovering the amounts named therein as if such contributory places formed a rural district, and the joint board were the authority thereof."

Provisional Order of the Local Government Board relating to the Darenth Valley Main Sewerage District (confirmed by 41 & 42 Vict. c. ccxi.):—

"XVI. The expenses incurred by the joint board in carrying

out the duties prescribed by this order, including all establishment charges, remuneration to clerk, treasurer, officers, and servants, shall be defrayed out of a common fund to be contributed by the urban sanitary district and several contributory places mentioned in the schedules hereto in the manner provided by s. 283 of the Public Health Act, 1875; and for the purposes of this order any person appointed by the joint board may inspect, take copies of, or make extracts from, any valuation list or rate for the relief of the poor within the united district or any part thereof, or any book relating to the same.

"XVII. The contributions of the rural sanitary authorities of the Dartford and Sevenoaks Unions respectively towards the common fund of the united district shall be contributed and raised in the same manner in every respect as if such contributions were required to defray special expenses within the meaning of the Public Health Act, 1875."

F. M. White, Q.C. (*A. Glen* with him), for the plaintiffs. The defendants are liable to pay the amounts specified in the three precepts referred to in the case. The proportions payable by the defendants were properly apportioned. "Rateable value" in s. 283 of the Public Health Act, 1875, means the value with reference to the special purpose for which the contributions are raised, and these contributions, by s. 17 of the provisional order, are to be raised as if they were required to defray special expenses. This being so, it is right to assess tithes and the other kinds of property referred to in paragraph 6 of the special case and s. 230 of the Public Health Act, 1875, at one fourth only of the rateable value. The effect of the construction contended for on behalf of the defendants would be to produce inequality in the proportions payable by different districts.

Channell, Q.C. (*H. F. Dickens* with him), for the defendants. The mode of apportionment adopted by the plaintiffs is incorrect, and the defendants are liable to pay, not the amounts specified in the precepts, but the amount to be ascertained, in accordance with the agreement referred to in paragraph 7 of the case, by adopting the correct mode of apportionment. That correct mode is to apportion the expenses according to the rateable value of

1887

DARENTH MAIN VALLEY SEWERAGE BOARD v. GUARDIANS OF POOR OF DARTFORD UNION.

all the property in the different districts according to the valuation list. That this is so is clear from the concluding words of s. 283 of the Public Health Act, 1875, "such value to be ascertained according to the valuation list in force for the time being."

F. M. White, Q.C., replied.

MATHEW, J. I am of opinion that the board are bound to apportion the amount of the expenses among the different districts in proportion to the rateable value of the properties in those districts. The values are to be ascertained according to the valuation list. When we look at the provisional order and the Public Health Act, the matter is perfectly clear. By s. 16 of the provisional order it is directed that "the expenses incurred by the joint board in carrying out the duties prescribed by this order, including all establishment charges, remuneration to clerk, treasurer, officers, and servants, shall be defrayed out of a common fund to be contributed by the urban sanitary district and several contributory places mentioned in the schedules hereto in manner provided by s. 283 of the Public Health Act, 1875." That section provides that any expenses incurred by a joint board "shall be defrayed out of a common fund to be contributed by the component districts or contributory places in proportion to the rateable value of the property in each district," and the meaning is made perfectly plain by the words that follow, "such value to be ascertained according to the valuation list in force for the time being." The provisional order also provides by s. 16 that, "for the purposes of this order any person appointed by the joint board may inspect, take copies of, or make extracts from, any valuation list or rate for the relief of the poor within the united district or any part thereof, or any book relating to the same."

What the valuation list contains, as a general rule, we know. The meaning of s. 283 of the Public Health Act, 1875, has, I think, if illumination were needful, light thrown upon it by s. 230. But here there does not appear to me to be any room for doubt as to what is meant when we consider the 17th clause of the provisional order, which directs how the contributions are

1887

DARENTH MAIN VALLEY SEWERAGE BOARD v. GUARDIANS OF POOR OF DARTFORD UNION.

to be obtained. It provides for the contributions from two of the districts only, and with reference to those two it directs that the contributions shall be "raised in the same manner in every respect as if such contributions were required to defray special expenses within the meaning of the Public Health Act, 1875." The clause as to special expenses in s. 230 of the Public Health Act, which directs that the deductions shall be made which are referred to in the case, does not apply here. It appears to me that the contention of Mr. White fails, and that our judgment must be for the defendants.

CAVE, J. I am of the same opinion. One point which Mr. White made was that the construction we are putting upon the clauses of the provisional order might lead to a different rate being levied upon one portion of the district from that levied upon another. If this provisional order, instead of dealing with one joint board only, were dealing with a great number, there would be a great deal to be said for that contention, and one would have struggled against any construction which might lead to what would apparently be unfair; but the provisional scheme does not deal with any board except this particular Darenth Valley Board. That being so, it was necessary to consider what was the best mode of ascertaining the proportion which each of the three contributing bodies should bring into the common fund. We have heard nothing to shew that the construction which we have adopted will lead to any injustice in this case, and it may be, having regard to the peculiar nature of this district, all of it being more or less of a suburban character, that there is really no such disproportion as would make it worth while to go to the trouble of distinguishing, for the purposes of the proportion which each is to pay, between the land which ultimately will be assessed at one fourth of its rateable value, and the land which will be assessed at the full rateable value. However that may be, we cannot, merely because it is suggested that there is a possibility of something of the kind, do otherwise than look to see what is the plain meaning of the Act; and, as far as I can judge from the provisions to which my

1887

DARENTH MAIN VALLEY SEWERAGE BOARD v. GUARDIANS OF POOR OF DARTFORD UNION.

attention has been called, the plain meaning is that which my brother Mathew has stated. I agree in his observations, and also in the conclusion at which he has arrived.

Judgment for the defendants on the special case.

Solicitors for plaintiffs: *Kingsford, Dorman, & Co., for Carnell & Son, Sevenoaks.*

Solicitors for defendants: *Pyke & Parrott, for J. & J. C. Hayward, Dartford.*

P. B. H.

July 11.

WITT *v.* BANNER.
SIMMONS, CLAIMANT.

Bill of Sale—Schedule—Inventory—Chattels "specifically described"—Sufficiency of Description—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

By s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, every bill of sale is void, except as against the grantor, in respect of chattels not specifically described in the schedule thereto annexed.

A bill of sale purported to assign "all and singular the several chattels and things specifically described in the schedule hereto annexed."

The description was, "four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames":—

Held, that the chattels were not "specifically described," and therefore the bill of sale was void in respect of them.

Roberts v. *Roberts* (13 Q. B. D. 794) distinguished.

APPEAL by the claimant in interpleader from the decision of the judge of the Bloomsbury County Court in favour of the execution creditor.

The execution debtor, who was a picture dealer, executed a bill of sale, dated December 24, 1886, which contained the following words: "He, the mortgagor, doth hereby assign unto the mortgagee, his executors, administrators, and assigns all and singular the several chattels and things specifically described in the schedule hereto annexed."

The part of the schedule on which the question raised on this appeal turned was as follows:—

1887

WITT v. BANNER.

"At 77, Mortimer Street aforesaid: Four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames."

By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4, "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

The county court judge held that the pictures included in the above schedule were not "specifically described," and therefore, in respect of those pictures, the bill of sale was void as against the execution creditor.

Candy, Q.C. (*H. J. Broun* with him), for the claimant, in support of the appeal. The description in the schedule to the bill of sale is sufficient. In *Roberts* v. *Roberts* (1) the Court of Appeal held that "household furniture and effects" was not a specific description, but that case is an authority for the present appellant's contention, for Lindley, L.J., said in his judgment, "What specific description is sufficient? A mere general description is not enough: there must be an inventory describing the chattels as business men would describe them: without going into minutiæ, it seems to me that it would be sufficient to state the nature of the articles and the number of them, for instance, twenty chairs, five tables." (2)

This statement of the law shews conclusively that the description here is specific within the meaning of the Act. The word used is "inventory," not "catalogue."

W. Thornton Sharp, for the execution creditor. The description is not one by which the particular chattels could be identified, and therefore is insufficient: *Brocklehurst* v. *Railway Printing and Publishing Co.* (3), decided by Field, J., at

(1) 13 Q. B. D. 794. (2) 13 Q. B. D. at p. 806.
(3) W. N. 1884, p. 70.

1887

WITT v. BANNER.

chambers. The chattels are not "specifically described" within the true meaning of those words: *Giles* v. *Melsom.* (1)

Candy, Q.C., replied.

WILLS, J. It is not easy to decide this question satisfactorily, for there is but little to guide us in ascertaining the meaning of the legislature. Section 4 of the Bills of Sale Act of 1882 provides that bills of sale "shall be void, except as against the grantor, in respect of any personal chattels not so specifically described." To interpret these words it is necessary to look back to the previous clause, and the words there are, "personal chattels specifically described in the said schedule," and the "said schedule" is one "containing an inventory of the chattels comprised in the bill of sale," so that they are to be in an inventory: and they are to be put into an inventory, and "specifically described" in it, and that is what the Act requires, and all that the Act requires. The word "specifically" is a word of definition, intended, to some extent, at all events, to limit generality of description. Lord Selborne says in *Giles* v. *Melsom* (2), that "specific" is a word of art. His description of a specific devise or bequest is "a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie." (3) I do not mean to say that the adverb "specifically" implies here the same absolute and precise amount of definition which is given to the adjective "specific" in the technical phraseology applicable to bequests or devises. Still, its interpretation must be sought in the same direction, and it can hardly be satisfied without something in the nature of description which helps to separate the thing described from the rest of the things of the same class. I cannot help thinking that the intention here was that, in order to avoid disputes, the description should in some way be specially applicable to the particular chattels assigned, and that it is not satisfied by words which will answer just as well for any other things of the same sort, and equal in number. We must give a reasonable meaning to the language of the statute, a meaning neither too precise nor

(1) Law Rep. 6 H. L. 24. (2) Law Rep. 6 H. L. at p. 33.
(3) Law Rep. 6 H. L. at p. 29.

yet too loose. I shall not attempt to give a definition of what description would satisfy the requirements of the Act; it is enough to say that this description does not. To hold it sufficient would be to support the very mischief which this enactment was intended to put an end to. Taking the whole instrument together, both the bill of sale and the schedule, if between the two there were enough to identify the chattels assigned, I think that would be sufficient. That, however, is not the case here. This bill of sale does not, as the bill of sale in *Roberts* v. *Roberts* (1) did, assign all the chattels on the premises. Probably the illustration given by Lindley, L.J., which was relied on for the appellant here, was not intended to apply to anything more than the particular case then before the Court. Here there is an assignment of what may be the whole or may be only a part of a picture-dealer's stock-in-trade. If it is only a part, it is difficult to see what human ingenuity could identify the chattels intended to be assigned, or prevent this bill of sale being set up whenever a distress or execution should be put in.

Taking the case of household furniture, I should say, by way of illustration, but without wishing to decide anything, that if the instrument assigned "a bedstead" in a particular room, and there were two bedsteads in the room, that would not be a specific description within the meaning of the Act. The one object of the Act is to prevent uncertainty, and the present description leaves it absolutely uncertain what chattels are intended to be assigned. I am of opinion that the decision of the county court judge was right.

GRANTHAM, J. I am of the same opinion. I do not think the definition given by Lord Selborne in *Giles* v. *Melsom* (2) helps us much here, for that was a decision as to the construction of a will. Looking at the meaning of the word "specifically," it is derived from species, and primâ facie one would be inclined to think that it would be enough to state the species, but I do not think we can hold that the decision in *Roberts* v. *Roberts* (1) is conclusive of this case. According to the dicta in *Roberts* v. *Roberts* (1) this bill of sale would perhaps be good, but there

(1) 13 Q. B. D. 794. (2) Law Rep. 6 H. L. 24.

1887

WITT v. BANNER.

Grantham, J.

is nothing in the present case to shew that the paintings described in the schedule were all that were in the shop. If that had been the case it would have been so stated, and if it had been so stated, I should have thought that the case came within the decision in *Roberts* v. *Roberts* (1), but as it is I think the description is insufficient.

Appeal dismissed.

Solicitors for appellant: *Nordon & Lazarus.*
Solicitors for respondent: *Allen & Sons.*

P. B. H.

June 14.

TUNNICLIFFE AND OTHERS, APPELLANTS. OVERSEERS OF BIRKDALE, RESPONDENTS.

Poor-rate—Rateability of Premises occupied as a certified Reformatory School—The Reformatory Schools Act, 1866 (29 & 30 *Vict. c.* 117), *s.* 4.

Premises, occupied as a school, the managers of which have received a certificate under the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 4, are liable to be rated to the poor-rate.

Sheppard v. *Bradford* (16 C. B. (N. S.) 369; 33 L. J. (M. C.) 182) dissented from.

CASE stated by the Lancashire Quarter Sessions upon appeal against a poor-rate.

The appellants were the managers of a reformatory school for youthful offenders of the Roman Catholic religion, certified under the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 4. The premises, which were held by the appellants partly under leases, partly as yearly tenants, consisted of school buildings in which handicrafts are taught, and a farm used for instruction in agriculture. The inmates were boys professing the Roman Catholic religion, sent on conviction to the reformatory as part of their sentence by justices' orders under s. 14 of the Act; but by s. 8 the managers "may decline to receive any youthful offender proposed to be sent to them." The expenses were partly defrayed out of contributions made by the counties in which the convictions took place under private agreements. The managers derived some profit from the sale of farm produce and of articles made by the inmates.

(1) 13 Q. B. D. 794.

The appellants contended that the houses and lands were not rateable, as they were "property in the nature of a gaol, and occupied by and for the purposes of the Crown only." The respondents denied that the property or the occupation was properly thus described, and contended that the premises were for rating purposes on the same footing as an industrial school certified under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 7. (1)

The sessions confirmed the rate.

Sir C. Russell, Q.C. (*Segar*, with him), for the appellants. The case of *Sheppard* v. *Bradford* (2), which was decided during the argument in the House of Lords of the *Mersey Docks Case* (3) (the leading authority on the rateability of land occupied for public purposes), is an express decision in the appellants' favour, and unless it has been overruled by the *Mersey Docks Case* (3), is binding on the Court. Assuming that, according to the *Mersey Docks Case* (3), the appellants, in order to obtain exemption, must prove their occupation to be on behalf of the Crown for the purposes of the government of the country, a reformatory under the Reformatory Schools Act, 1866, is, practically speaking, a gaol, and falls within the exception. It is certified by a secretary of state (s. 4) and inspected by a government inspector (s. 5), its officers have the privileges of constables (s. 13), and the inmates are prisoners undergoing part of a criminal sentence (s. 14), and are conveyed there at the expense of the prison authority of the district (s. 23). The expenses are defrayed partly by a contribution from the Treasury (s. 24), partly by maintenance money paid by the parents of the children under orders of justices (s. 25). An industrial school certified under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), s. 7, was held rateable in *Reg.* v. *West Derby* (4), but there is a broad distinction between that case and the present one. The children to be received into an industrial school are homeless and destitute children (Industrial Schools Act, 1866, s. 14), those who are sent to a reformatory must

(1) *Held* to be rateable in *Reg.* v. *West Derby*, Law Rep. 10 Q. B. 283.

(2) 16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182.

(3) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

(4) Law Rep. 10 Q. B. 283.

1887

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

have been convicted (Reformatory Schools Act, 1866, s. 14). A reformatory is, an industrial school is not, a gaol. By s. 8 of the Industrial Schools Act, 1866, a certified industrial school cannot be a certified reformatory school.

Henn Collins, Q.C. (*Shee*, with him), for the respondents. According to Lord Cranworth, in the *Mersey Docks Case* (1), the test of exemption from rateability is whether the lands or houses "are occupied by servants of the Crown for the purposes of the Crown." The appellants are the board of management of a private charity. It rests with them whether or not they will take out a certificate under the Reformatory Schools Act, 1866, s. 4. Even if they have taken out such a certificate, they can still refuse to receive any particular young criminal at their own discretion (s. 8). The words, "shall be deemed to have undertaken to educate, clothe, lodge, and feed" (s. 8), shew that they are independent contractors with the Government, not servants of the Crown. Incidentally, as a matter connected with the charity which they administer, they are willing by arrangement with the Government to take charge of youths who have been convicted, but this does not render their occupation an occupation "for the purposes of the Crown." Their position is substantially the same as that of managers of industrial schools, which are rateable: *Reg.* v. *West Derby*. (2) Blackburn, J., in that case, treats *Sheppard* v. *Bradford* (3) as overruled by the *Mersey Docks Case*. (1)

Segar, in reply.

DAY, J. This school is, in my opinion, rateable according to the principle laid down by the House of Lords in the *Mersey Docks Case* (1), which is, that all lands and houses capable of beneficial user are rateable, unless, to follow the words of Lord Cranworth, they are "occupied by servants of the Crown for the purposes of the Crown." A county gaol is not occupied by "servants of the Crown" but it is occupied "for the purposes of the Crown." It is in the nature of a state institution. A reformatory, like a gaol, contains inmates who have been convicted,

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

(2) Law Rep. 10 Q. B. 283.

(3) 16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182.

and who are detained by compulsion. It is also inspected, subsidised, and to some extent regulated by the State. But it is none the less a private establishment. Private persons build it, endow it, and carry it on. The system is like that of boarding out young paupers. The managers think proper to take out a certificate, and as long as they receive youthful offenders they must comply with the Act; but without the consent of any other person they may discontinue receiving them and use the buildings and the land for other purposes. I see no distinction between a reformatory and an industrial school, and two of the judges (Blackburn and Mellor, JJ.) who gave their opinions in the *Mersey Docks Case* (1) held, in *Reg.* v. *West Derby* (2), that an industrial school was rateable.

WILLS, J. I am of the same opinion. The principle underlying the *Mersey Docks Case* (1) has been pointed out in several cases. Its condensed expression is perhaps to be found in the judgment of Lord Cranworth: "The Crown not being named is not bound by the Act (43 Eliz. c. 2). It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown, that this mistake has arisen. This principle exempts from rates not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country." Now, does this reformatory school stand in such a relation to the "public government of the country" that those who occupy it are not rateable? A county gaol, to which it has been compared, and which in obvious ways

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. (2) Law Rep. 10 Q. B. 283.

1887

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

WILLS, J.

it resembles, is vested in the sheriff as the representative of the Crown, and is supported by a county rate. But this reformatory belongs to a private committee of benevolent persons. They in no sense represent the Crown, and they have no share in or connection with the "public government of the country." They receive, indeed, a certificate from the Secretary of State entitling them, under certain conditions, as a matter of benevolence, to take charge of young prisoners. But they can refuse any proposed inmate, and at any moment they can throw up their certificate and sell or let the land for any purpose. They are not servants of the Crown and they do not occupy the reformatory for the "government of the country," and their school and lands are clearly rateable.

As to *Sheppard* v. *Bradford* (1), the decision was given before the decision of the House of Lords in the *Mersey Docks Case* (2), and it is impossible to read the judgments without seeing that they are based upon the old criterion, repudiated in the House of Lords, of "public purposes." On the other hand, *Reg.* v. *West Derby* (3) is a decisive authority. There is a close analogy between a reformatory and an industrial school, and it is clear that Blackburn, J., would have held both institutions to be rateable for precisely the same reasons.

Appeal dismissed.

Solicitors for appellants: *Gregory, Rowcliffes & Co., for Threlfall, Southport.*

Solicitors for respondents: *Bower, Cotton & Bower, for Parr, Sadler, & Dickinson, Ormskirk.*

(1) 16 C. B. (N.S.) 369; 33 L. J. (M.C.) 682.

(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

(3) Law Rep. 10 Q. B. 283.

H. D. W.

HEATHCOTE *v.* LIVESLEY.

1887
June 15.

Bankruptcy—Interpleader—Completion of Execution—"Seizure and Sale"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 45, *sub-ss.* 1, 2; *s.* 46, *sub-s.* 2.

Goods of the debtor were taken in execution by the plaintiff under a judgment for a sum exceeding 20*l.* The goods having been claimed by a third person, an interpleader order was made on March 16 directing that, unless payment were made or security given by the claimant according to the provisions of the order, the sheriff should sell the goods and pay the proceeds of the sale into court. The claimant did not comply with the provisions of the order, and ultimately withdrew his claim. On March 28 the goods were sold and the proceeds paid into court on April 6. On April 7 notice of a bankruptcy petition having been presented against the debtor was served on the sheriff, and the debtor was adjudged bankrupt on such petition:—

Held, that under ss. 45 and 46 of the Bankruptcy Act, 1883 (1), the trustee in bankruptcy of the debtor was entitled as against the plaintiff to the money in court.

A SUMMONS having been taken out in chambers by the plaintiff for the payment to him of 113*l.* 1*s.* 3*d.*, paid into court by the sheriff of Derbyshire under an interpleader order, Pollock, B., referred the matter to the Court.

(1) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45: "(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2.) For the purposes of this Act an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." Sect. 46: "(1.) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge. (2.) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of the sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the

1887

HEATHCOTE v. LIVESLEY.

It appeared that the plaintiff, having recovered judgment against the defendant for 100*l.*, issued execution, under which, on March 6, goods on the defendant's premises were seized by the sheriff. The goods were claimed by a third person, and on March 16 an interpleader order was made directing that, unless the claimant should pay into court 120*l.* or give proper security within ten days, the sheriff should sell the goods and pay the proceeds into court to abide the event of an issue between the claimant and the plaintiff. The claimant did not comply with the provisions of the order, and ultimately withdrew his claim. On March 28 the goods were sold by the sheriff in pursuance of the interpleader order. On March 30 a receiving order in bankruptcy was made against the defendant. On April 1 the official receiver served the sheriff with notice of the receiving order. On April 5 the defendant was adjudicated bankrupt, and on April 6 the sheriff paid into Court the proceeds of the sale after deducting the usual expenses. On April 7 notice of the presentation of the bankruptcy petition against the debtor was served on the sheriff.

M. Muir Mackenzie, for the trustee. The execution was completed by seizure and sale at the date of the receiving order (s. 45, sub-ss. 1 and 2); but the judgment having been for over 20*l.*, and the sheriff having been served with a notice of the bankruptcy petition during the period of fourteen days from the sale for which he is bound by law to hold the proceeds, the trustee is entitled to the proceeds as against the execution creditor (s. 46, sub-s. 2.) If, however, the sale is to be regarded as having taken place, not in consequence of the execution, but under the interpleader order, then the execution not having been completed by seizure and sale, the trustee is entitled to the proceeds as against the execution creditor (s. 45, sub-s. 1.) [He cited *O'Brien* v. *Brodie*. (1)]

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debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him."

(1) Law Rep. 1 Exch. 302. See also *Ex parte Halling*, *In re Haydon* (7 Ch. D. 157).

Smyly, for the execution creditor. The money in court is not the proceeds of an execution but of a sale by order of the Court in an interpleader proceeding. Sect. 46, sub-s. 2, has consequently no application. The sum having no reference to the execution the execution creditor is not seeking "to retain the benefit of the execution" (s. 45, sub-s. 1), and consequently s. 45, sub-ss. 1 and 2, have no application. Neither section, therefore, defeats the claim of the execution creditor.

DAY, J. The trustee is clearly entitled to have the sum in court paid over to him. The Interpleader Acts protect the sheriff, but do not in my opinion alter the capacity in which he sells or that in which he holds the proceeds of goods taken in execution and sold. The sale was by the sheriff in his capacity of sheriff under the writ of fi. fa., not under some other trust or duty imposed by the Interpleader Acts. Such sale taken in connection with the previous seizure constituted a seizure and sale and a completed execution within the meaning of s. 45, sub-ss. 1 and 2. But the judgment debt being for more than 20*l.*, the sheriff was bound under s. 46, sub-s. 2, to retain the proceeds for fourteen days, and during this period the trustee duly intervened and gave the sheriff notice of the bankruptcy petition and so entitled himself under s. 46, sub-s. 2, as against the execution creditor to the proceeds as part of the bankrupt's estate. It is immaterial, in my opinion, that the sheriff in fact paid the money into court under the interpleader order before the expiration of the fourteen days.

WILLS, J. I am of the same opinion. The dilemma is complete. The sale either was or was not a sale under the execution. If it was a sale under the execution, the trustee having intervened within fourteen days, his title is clear under s. 46, sub-s. 2. My brother Day takes this view of the facts, and I express no doubt of its correctness. But there is an alternative. If the sale for whatever reason was not a sale under the execution, the execution has not been completed by sale as well as seizure, and the title of the trustee is equally clear under s. 45, sub-ss. 1 and 2. The argument for the execution creditor that he would not be

1887

HEATHCOTE v. LIVESLEY.

"retaining the benefit of the execution" if he were paid this money, is of unintelligible subtlety. The only ground on which it could be paid to him would be that he was entitled to the benefit of the execution. It has been shewn with almost mathematical precision that quâcunque viâ, either under s. 46, sub-s. 2, or under s. 45, sub-ss. 1 and 2, the trustee is entitled to the money.

Order for payment out of Court to the trustee of the sum claimed.

Solicitor for trustee: *Solicitor to the Board of Trade.*

Solicitors for plaintiff: *Brownlow & Howe, for Brown & Ainsworth, Stockport.*

H. D. W.

July 11. TAYLOR, GARNETT, EVANS & CO. *v.* THE OVERSEERS OF THE POOR OF PENDLETON.

Poor-rate—Occupation—Advertising Hoardings—Agreement creating Tenancy—Liability to be rated.

By an agreement between an owner of land and an advertising agent the owner agreed to let and the agent to take an advertising station at a yearly rent, the tenancy to commence from completion of erection, and continue seven years, and the agent agreed to pay rates and taxes.

By another agreement an owner agreed to allow the advertising agent the privilege of erecting an advertising hoarding, the agent to pay a yearly rent, and the owner agreed to allow the agent the further privilege of removing a wall, the agreement to remain in force for three years, and be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he agreed to refund £20.

In both agreements the dimensions of the hoardings to be erected were specified.

Advertising hoardings supported on posts fixed into the ground were erected. In the first case the structure was used partly by the owner as a shed, and partly by the advertising agent as a hoarding; in the second case, exclusively by the agent as a hoarding:—

Held, that each of the agreements created a tenancy, and conferred an exclusive occupation, and not merely a licence, and therefore the advertising agent was liable to be rated to the relief of the poor in respect of both hoardings as occupier of advertising stations.

SPECIAL CASE stated by justices at general quarter sessions for the county of Lancaster.

1887

TAYLOR v. OVERSEERS OF PENDLETON.

Messrs. Taylor, Garnett, Evans & Co., who carry on business as advertising agents under the style or firm of "The Manchester Guardian Advertising Company," appealed against a rate or assessment made by the overseers of the poor of the township of Pendleton, in the county of Lancaster, and estimated for the year ending Lady Day, 1887, after the rate of 3*s.* 10*d.* in the pound.

The appellants were rated as the occupiers of advertising hoardings and stations.

The following extract from the rate-book shewed the particulars of the rate so far as it was necessary to state the same for the purpose of the case:—

No.	Name of Occupier.	Name of Owner.	Description of Property.	Situation of Property.	Gross estimated Rental.	Rateable Value.	Rate at 3*s.* 10*d.* in the £.
					£	£ *s.*	£ *s.* *d.*
50	Manchester Guardian Advertising Company.	Hulme Bros.	Advertising Hoarding and Station.	Broad Street	45	40 10	7 15 3
2140	„ „	Taylor, Garnett, & Co.	„ „	„ „	60	54 0	10 7 0

The advertising hoarding and station No. 50 in the rate is referred to as hoarding No. 1. With regard to this hoarding the following facts were proved. Previous to the making of the agreement next mentioned Messrs. Hulme Brothers, who carry on the business of timber merchants in Pendleton, were possessed of a plot of land in Pendleton, bounded on one side by Broad Street, and on another side by Withington Street, which was used by them for a timber yard. Upon this land the appellants were desirous of having an advertising station, and Hulme Brothers were intending to erect a shed for the purpose of storing timber.

On February 21, 1884, an agreement was entered into between Hulme Brothers and the appellants as follows:—

"Memorandum of agreement made and entered into this 21st day of February, 1884, between Taylor, Garnett, Evans & Co., of 3, Cross Street, Manchester, in the county of Lancaster, and

1887

TAYLOR v. OVERSEERS OF PENDLETON.

Hulme Brothers of 17, Quay Street, Manchester, whereby Hulme Brothers as aforesaid agree to let, and the said Taylor, Garnett, Evans & Co. agree to take, the advertising station situate in front of Hulme Brothers' land, Broad Street, Pendleton, at the yearly rent or sum of £45, the said rent to become due and payable quarterly on the usual quarter days, and the tenancy to commence from the date of completion of erection and remain in force for a period of seven years.

"The said Taylor, Garnett, Evans & Co. to pay all rates and taxes except chief rent (if any) and property tax. The dimensions of the hoarding to be twenty-four feet high with the whole of the frontage and the return to gateway.

"Hulme Brothers."

This agreement was not under seal, and was stamped with a 5*s.* stamp. Hoarding No. 1 is the hoarding referred to in the agreement.

In order to carry out the agreement, and also to provide a timber shed for their own purposes, Messrs. Hulme Brothers erected a structure, the frontage of which to Broad Street was 57 feet long, the frontage to the corner between the two streets 8¼ feet long, and the return frontage to Withington Street 19 feet long.

The two sides of the structure fronting Broad Street and the corner between the two streets were supported by six large timber posts fixed firmly into the ground immediately behind the wall.

The posts were 24 feet high, the same height as the hoarding, and were each 1 foot square throughout. There was an interval of 18 feet between post and post. Strong timber cross-pieces were bolted with iron bolts to the posts, and the planks of the hoarding upon which the advertisements were fixed were strongly nailed on to the timber cross-pieces.

The roof of the shed, which was of felt, came up to the top of the hoarding on the Broad Street side, and sloped inwards and downwards from that part of the hoarding into the yard.

The structure was designed and erected for the combined purpose of a drying-shed for timber and an advertising hoarding.

The advertising hoarding and station, No. 2140, in the rate is called hoarding No. 2.

With regard to this hoarding the following facts were proved:

On February 8, 1883, the following agreement was made between the appellants and one W. H. Harvey:—

"I hereby agree to allow Messrs. Taylor, Garnett, Evans & Co. of 3, Cross Street, Manchester, the privilege of erecting an advertising hoarding of the following dimensions or thereabouts—144 feet long and 25 feet high from top of wall, on my land, Broad Street, Pendleton, in consideration of which the said Taylor, Garnett, Evans & Co. to pay me the yearly rent of 30*l.* I also agree to allow the said Taylor, Garnett, Evans, & Co. the further privilege, if they wish it, of removing the wall now standing, and building the hoarding from the street level, making a total height of 32 feet 6 inches. This agreement to remain in force for a term of three years at least absolutely from this date, and to be afterwards terminable by a twelve months' notice on either side. If, however, I am obliged, owing to the land being required for other purposes, to give the said Taylor, Garnett, Evans & Co. notice to quit at a date less than twelve months beyond the said term of three years, I agree to refund the sum of twenty pounds to them.

"W. H. Harvey."

This agreement was not under seal, and was stamped with a 5*s.* stamp.

After the making of the agreement the appellants took down and removed the wall in the agreement mentioned, and erected a hoarding where the wall formerly stood. The hoarding was erected by the appellants for the purpose of being used by them as an advertising station.

The hoarding was 122 feet long and 25 feet high. It was made of planks bolted to a framework of cross-timbers. The cross-timbers were bolted to and supported by sixteen wooden posts, in size 7 inches by 3 inches, and 25 feet high above the ground there were nine cross-rails or timbers between each pair of posts, and each cross-rail was 4½ inches by 1½ inches thick.

The sixteen wooden posts were fixed 3 feet deep in the ground immediately behind the cross-timbers at equal intervals of 8 feet between post and post.

Each of the posts was fastened by bolts to a backstay, which

1887

TAYLOR v. OVERSEERS OF PENDLETON.

was carried back from the post and was in turn fastened by bolts to a timber post fixed 4 feet deep in the ground. These last-named posts stood out of the ground about 2 feet, and were 16 feet away from the front post to which the cross-rails supporting the planks of the hoarding were fastened.

The space of land between the hoarding and the back posts to which the stays were fixed was waste land upon which a little rough grass grew.

The court of quarter sessions gave judgment for the appellants in respect of both the hoardings, subject to a special case.

If the Court should be of opinion that either of the hoardings was rateable the judgment of quarter sessions in respect of that hoarding was to be quashed, otherwise to stand.

Edmund Sutton, for the overseers. The two agreements set out in the case shew conclusively that both hoardings are rateable. Each of the agreements creates an exclusive occupation, and does not merely give a licence. If a stranger were to pull down either of the hoardings Messrs. Taylor, Garnett, Evans, & Co. would be the proper plaintiffs in an action for trespass. The decision in *Reg.* v. *St. Pancras Assessment Committee* (1), by which the court of quarter sessions thought they were bound, is distinguishable, for in that case there was no permanency of occupation, and the hoardings were not fixed as these are.

J. M. Yates, for the respondents (the appellants below). The order of sessions was right. Exclusive enjoyment is not sufficient to give rise to rateability; there must be exclusive occupation: *Smith* v. *Lambeth Assessment Committee*. (2) Here only a licence or privilege is conferred.

Sutton, in reply, referred to *Cory* v. *Bristow* (3); *Electric Telegraph Co.* v. *Overseers of Salford* (4); *Lancashire Telephone Co.* v. *Overseers of Manchester* (5); *Shaw, Ashton, & Thorpe* v. *Salford Union*. (6)

(1) 2 Q. B. D. 581.
(2) 9 Q. B. D. 585; 10 Q. B. D. 327.
(3) Law Rep. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262.
(4) 11 Ex. 181.
(5) 13 Q. B. D. 700; 14 Q. B. D. 267.
(6) Before Blackburn and Quain, JJ., May, 1876. Not reported. Copies of the case and the order of the Court were produced.

WILLS, J. The question in this case is, whether Messrs. Taylor, Garnett, Evans, & Co. have an exclusive occupation of the soil, which is physically occupied by the posts which support their hoardings, or have a mere licence and no tenancy.

On the first agreement, I think the case is very clear. I have no doubt that the document gives an exclusive occupation. The agreement provides for letting and taking the advertising station. Those are words appropriate to a demise. No doubt this is not conclusive, and it is necessary to look at the whole document, but there is nothing in the context to require us to reject the ordinary meaning of the words, and an advertising station is clearly capable of being the subject of a demise. Then the letting is to be at a yearly rent, which is an expression applicable primarily to a tenancy. It is further provided that the tenancy is to remain in force for a period of seven years. It is true that no tenancy for seven years can be created by a document which is not under seal; still such a document may operate as a demise, and after payment of rent a tenancy from year to year would come into existence. Therefore all the first part of the document is applicable to a demise, and the proper mode of construction is to give the natural meaning to the words used, unless there is some reason, either in the context or in the nature of things, against it. Here there is nothing against it in the context, for on looking at the next clause it appears that Messrs. Taylor, Garnett, Evans, & Co., are to pay rates and taxes and property tax, and it is difficult to see how they could be called upon to pay property tax unless there were a demise; with a licence only they could not be called upon to pay it. This affords a cogent argument that the parties intended the document to operate as a demise. The meaning of the stipulation as to payment of rates seems to be this, that Messrs. Hulme Brothers saw that the overseers would probably increase the rate if the premises became more valuable by reason of Messrs. Taylor, Garnett, Evans, & Co.'s use of them. They desired to avoid bearing that increase of burden; and the mode in which they secured themselves was by demising the "advertising station," and stipulating that the rates should fall on Messrs. Taylor, Garnett, Evans, & Co. Had they not made a demise of the land

1887

TAYLOR v. OVERSEERS OF PENDLETON.

WILLS, J.

it would have been impossible to say how much of the rate payable in respect of the premises would have been due in respect of their value as an advertising station, and how much in respect of their value as a drying-shed for timber. It is impossible to work out the intention of the parties without a tenancy.

As to the second document I have entertained some doubts, and I think it is a more ambiguous agreement than the first, but on the balance of conflicting considerations I have come to the conclusion that its real effect is to give an exclusive right of occupation. In adopting this view I am not uninfluenced by the decision in *Shaw, Ashton, & Thorpe* v. *Salford Union* (1), because in that case Blackburn and Quain, JJ., on an agreement more favourable to those who opposed the rate than this agreement is, came to the conclusion that the property was rateable, Generally speaking, it is poor work to take one ambiguous agreement and argue from the construction which has been put upon it, as to the construction of different words applied to different circumstances, but there are cases where the facts are undistinguishable, and in such cases the construction which has been put upon one agreement may afford a guide to the true construction of another. In the case I have referred to there was more to be said against the rate than there is here. The words used there were more like words intended to confer a licence only than those used in the present case. I think the word "privilege," which is used in this agreement, is not inconsistent with the right to occupy. I have come to the conclusion that on the proper construction this agreement also creates a tenancy.

For these reasons I am of opinion that both the hoardings are rateable, and, therefore, as to both the appeal ought to be allowed.

GRANTHAM, J. I am of the same opinion. It seems to me that, both on the authorities and on the facts, Messrs. Taylor, Garnett, Evans, & Co. have a profitable occupation, and ought to pay rates.

Speaking for myself, I should say that the second agreement is even stronger in favour of this view than the first, for in

(1) Not reported.

the first case the structure was used for a double purpose, as a drying-shed for timber and as an advertising hoarding. I have no doubt, however, that the language of the first agreement was intended to apply to occupation.

As to the second agreement, I am of opinion that it gave an exclusive occupation for a distinct term of three years. The words used are, "the privilege of erecting an advertising hoarding." Those words confer the right to build; it is like taking land to build a house on, where the lessee would pay a ground rent, and would be the occupier of the land. I am of opinion on the authorities and on the facts, that this second document amounts to a lease for a distinct purpose for a distinct time. In other cases on a less permanent occupation, property has been held rateable. In *Cory* v. *Bristow* (1) the hulk was only attached by chains to moorings in the bed of the river, and it was held rateable. In *Lancashire Telephone Company* v. *Overseers of Manchester* (2) the mere fixing of iron bolts in walls or roofs to support the telephone wires rendered the owners of the wires liable to be rated. So in *Electric Telegraph Company* v. *Overseers of Salford* (3) the company was held liable to be rated in respect of the telegraph posts and wires. That was a case of wires going over the land, not in the land, but it was held that the telegraph company were using the land. In *Shaw, Ashton, & Thorpe* v. *Salford Union* (4) a distinction was taken between the case of posts being put into the ground to keep up a hoarding, where it was held that the hoarding was rateable, and that of a hoarding fastened to the gable end of a building, which was held not to be rateable. In the present case a specific piece of ground is let for the purpose of erecting a building, and there is also a right to pull down a wall standing upon the land.

Order of sessions quashed.

Solicitors for the overseers: *Radford & Frankland, for Bowden & Walker, Manchester.*

Solicitor for Taylor, Garnett, Evans, & Co.: *A. Lings, Manchester.*

(1) 2 App. Cas. 262.
(2) 14 Q. B. D. 267.
(3) 11 Ex. 181.
(4) Not reported.

P. B. H.

1887
May 18, 27.

[IN THE COURT OF APPEAL.]

KNIGHT *v.* COALES.

Practice—Referee—Compulsory Reference—Power to refer compulsorily all Issues where Part of Matter in Dispute is Matter of mere Account—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 75), *s.* 3—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 57.

Under s. 3 of the Common Law Procedure Act, 1854, the Court or a judge has jurisdiction to refer compulsorily the whole matter in dispute in an action, if any part of the matter in dispute consists of matter of mere account which cannot conveniently be tried in the ordinary way.

So *held* by Fry and Lopes, L.JJ.

By Lord Esher, M.R.:—If any part of the matter in dispute can be brought within s. 3 of the Common Law Procedure Act, 1854, as being matter of mere account which cannot conveniently be tried in the ordinary way, then s. 57 of the Judicature Act, 1873, applies, and the Court or a judge has jurisdiction to refer compulsorily, under that section, all the issues in the cause.

Decision of the Queen's Bench Division affirmed.

APPEAL from an order of the Queen's Bench Division (Day and Wills, JJ.) affirming an order of Huddleston, B., at chambers compulsorily referring all questions in the action to one of the official referees.

The following statement of the facts is taken from the judgment read by Lopes, L.J.:—The plaintiff's claim is for a sum of 92*l.* 0*s.* 7*d.*, being 53*l.* 5*s.* balance of rent in arrear of a furnished house let by the plaintiff to the defendant for a year, and 38*l.* 15*s.* 7*d.* for dilapidations to the furniture therein. There were no pleadings, but the defendant's case, as appeared from her affidavit made in her application to set aside judgment which had been signed for non-appearance, was that, with the plaintiff's consent, she had underlet the house at an improved rent for a longer term, which improved rent was to be paid to the plaintiff, the plaintiff agreeing to release the defendant from all responsibility in respect of arrears and future rent. The defendant also alleged that the plaintiff agreed to return to her the difference between the rents after retaining the arrears due to him, and that at the time the action was brought 60*l.* was due on that account.

A long list of alleged dilapidations was made out and sent to

the defendant. The defendant's case was that some articles claimed for in the list were never on the premises; that others had been replaced and no credit given for them, and that a large quantity of things were left on the premises belonging to the defendant which were of greater value than those damaged or missing; but the defendant admitted she was liable for dilapidations if there were any.

The defendant appealed from the order of the Queen's Bench Division.

Lumley Smith, Q.C., and *C. A. Reeve*, for the appellant.

Channell, Q.C., and *T. W. Chitty*, for the respondent.

The arguments sufficiently appear from the judgments.

The following cases were cited: *Clow* v. *Harper* (1), *Ward* v. *Pilley* (2), *Martin* v. *Fyfe* (3), *Goodwin* v. *Budden* (4), *Birmingham Gas Co.* v. *Ratcliffe* (5), *Hoch* v. *Boor* (6), *Cummins* v. *Birkett* (7), and *Angell* v. *Felgate*. (8)

Cur. adv. vult.

May 27. LOPES, L.J., read the following judgment of Fry, L.J., and himself:—In this case the Divisional Court confirmed an order made by Huddleston, B., at chambers for a compulsory reference of all questions in this action to an official referee.

The defendant appeals against this order, on the ground, first, that there was in the circumstances of this case no jurisdiction to make the order; and, secondly, that if there was, the Court wrongly exercised its discretion in making it.

The order was made either under s. 3 of the Common Law Procedure Act, 1854, or under s. 57 of the Judicature Act, 1873. Important questions arise as to the true construction of these sections respectively. It will be convenient to state the facts of the case. [The Lord Justice stated them as above set out.]

The 3rd section of the Common Law Procedure Act, 1854, authorizes a compulsory reference of the whole matter in dispute

(1) 3 Ex. D. 198.
(2) 5 Q. B. D. 427.
(3) 49 L. T. Rep. (N.S.) 107; 50 L. T. Rep. (N.S.) 72.
(4) 42 L. T. Rep. (N.S.) 536.
(5) Law Rep. 6 Ex. 224.
(6) 49 L. J. (Q.B.) 665.
(7) 3 H. & N. 156.
(8) 7 H. & N. 396.

1887

KNIGHT v. COALES.

Lopes, L.J.

if after writ it be made to appear that the matter in dispute consists *wholly* or in *part* of matter of mere account which cannot conveniently be tried in the ordinary way. The matter in dispute must consist wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way. There is no jurisdiction to refer compulsorily unless the matter in dispute complies with these conditions. If it is wholly matter of mere account, or if it is in part matter of mere account which cannot conveniently be tried in the ordinary way, it may be referred, wholly or in part, compulsorily—whether wholly or in part is a matter for the discretion of the Court or a judge, but nothing can be referred compulsorily unless a part is matter of mere account which cannot be conveniently tried in the ordinary way, i.e., by a judge and jury, or a judge without a jury. The foundation of the jurisdiction rests upon the fact that there is a part which is mere matter of account which cannot be conveniently tried in the ordinary way; where it is established to the satisfaction of the Court or a judge that a part is matter of mere account which cannot be conveniently tried in the ordinary way jurisdiction to refer attaches, and what should in the circumstances be done is discretionary.

We believe this to be the true construction of this section of the Common Law Procedure Act, and such a construction is not inconsistent with the decision in *Clow* v. *Harper*. (1) That case has, owing to the language used by some of the judges who decided it, been misunderstood. It was an action for breach of covenant to repair. The defendant denied liability in toto. There was, therefore, a preliminary question of liability to be decided before any question of quantum of damages, or of account, could arise. There was no matter of mere account. If the defendant was found not to be liable, no matter of account ever could arise. Cockburn, C.J., in the course of his judgment says: "If part of it only is matter of mere account, that part should be directed to be disposed of by arbitration, but that part alone." If he meant there was no power, when part was matter of mere account which could not be conveniently tried in the ordinary way, to refer the whole matter in dispute, we cannot agree with his view,

(1) 3 Ex. D. 198.

nor is it in accordance with the opinions of the other judges who were parties to the judgment. Brett, L.J., says: "It is not necessary to decide whether an order can be made to refer compulsorily not only what is matter of account but the other part also." Bramwell, L.J., referring to the practice which had long prevailed—viz., when a part was matter of mere account to refer the whole says that "he does not like to say the practice is wrong;" and both Bramwell, L.J., and Cotton, L.J., confine their judgments to the facts of the case then before them.

Ward v. *Pilley* (1) decided that any question of account which may be referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854, may be referred compulsorily to an official referee under s. 57 of the Judicature Act, 1873, and that in any case in which the Court has jurisdiction to refer compulsorily a question of account to an official referee, it has also jurisdiction so to refer all the other issues in the action. Bramwell, L.J., in the course of his judgment says: "I believe that not long since a notion got abroad that under s. 3 of the Common Law Procedure Act we had power to refer questions only of account, and not other matters, but that mistake we set right in a case which we decided in this Court at the last sittings. There is this strong objection to referring some only of the issues and leaving others to be tried by a jury, that you have two trials instead of one, and so involve double expense." From this expression of opinion Brett, L.J., who delivered a judgment in the same case, and also was a party to the judgment in *Clow* v. *Harper* (2), does not dissent. It is doubtful whether the case referred to by Bramwell, L.J., is reported, but it is clear that he considered that matters other than matters of mere account could be referred compulsorily, and that *Clow* v. *Harper* (2) was not opposed to that law. *Clow* v. *Harper* (2) cannot, therefore, be said to be an authority inconsistent with the construction which we put upon this section of the Common Law Procedure Act, 1854. *Martin* v. *Fyfe* (3) was argued before Denman, J. and myself in the High Court, and we considered in that case that notwithstanding *Clow* v. *Harper* (2) it was com-

(1) 5 Q. B. D. 427. (2) 3 Ex. D. 198.
(3) 49 L. T. (N.S.) 107.

1887

KNIGHT v. COALES.

Lopes, L.J.

petent for us to hold that an action may be referred under s. 3 of the Common Law Procedure Act, 1854, although the question in dispute does not consist entirely of matters of account. I adhere to the opinion I then expressed. If any part of the matter in dispute consists of mere account which cannot conveniently be tried in the ordinary way, s. 3 gives a jurisdiction to refer not only that part, but any other issues in the action which the Court or a judge may in his discretion think fit. Whether or not that discretion is properly exercised will, like every other matter of discretion, be subject-matter of appeal. Before the decision in *Clow* v. *Harper* (1) it was the practice to refer too readily, and many actions were referred compulsorily which ought never to have been referred at all. The learned judges who decided that case doubtless had this in their minds, and wished to contract the too lavish use of the discretion vested in the Court or a judge under s. 3 of the Common Law Procedure Act, 1854. We are of opinion that this discretion should be exercised with extreme caution, regard being had to the relative importance of that which is matter of account as compared with that which is not. The matter of account giving the jurisdiction should not be incidental or subordinate to the other questions in dispute, but should be a substantial element to be decided in the action to justify a compulsory reference. We proceed to apply this construction of s. 3 to the present case. Is there any matter of mere account in dispute which cannot be conveniently tried in the ordinary way, which will give jurisdiction? We think there is. The dilapidations are matters of mere account. The defendant admits liability for dilapidations. This case is not similar to *Clow* v. *Harper* (1) where the defendant denied liability to repair in toto, and where no question of account could arise, if he established non-liability. The defendant here says: "True it is that I am liable to make good all dilapidations, but you must prove the particular items and the amounts in respect to which my admitted liability arises." We think that this is a matter of mere account within s. 3 of the Common Law Procedure Act, 1854. "Mere account" does not mean only figures and arithmetical calculations; it includes a case where liability is admitted, and the items

(1) 3 Ex. D. 198.

in respect to which the liability arises have to be arranged between the parties, such as the items contained in this list of dilapidations. We also think that this part of the case, having regard to the number of items contained in the list, and the insignificance of many of them, could not be conveniently tried in the ordinary way. There is, therefore, jurisdiction to refer this part or the whole matter in dispute. Whether the whole should be referred is a matter of discretion. We are not prepared to say, having regard to the issue raised between the plaintiff and defendant in respect of the agreement, that we should have ordered a compulsory reference of the action, but Huddleston, B., in chambers, exercising his discretion, thought the whole action ought to be referred to an official referee, and the Divisional Court, exercising their discretion, confirmed that order. In these circumstances, we are not prepared to say the discretion was wrongly exercised.

This being our view, it is unnecessary to consider s. 57 of the Judicature Act, 1873. The appeal must be dismissed.

May 27. LORD ESHER, M.R. In this case there was a claim for arrears of rent in respect of a furnished house let by the plaintiff to the defendant, and an issue was raised as to an alleged agreement by which the defendant was to be released from payment of the arrears, and there was also a claim for certain dilapidations, that is to say, a claim in respect of certain china and glass let with the house, which were alleged to have been broken or damaged. The judge at chambers was of opinion that the question of dilapidations was a matter of mere account, and that he had therefore power to deal with the whole matter in dispute, and refer it to an official referee under s. 57 of the Judicature Act, 1873, which he accordingly did. This order was affirmed by the Divisional Court. It was argued before us that there was here no matter of mere account at all, and that even if there was, the judge had no power to refer the whole matter, but only that part which was matter of mere account. There was a further contention that if the judge had power to refer the whole matter he ought not, in his discretion, to have done so.

The argument turned upon the true interpretation of s. 3 of

1887

KNIGHT v. COALES.

Lord Esher, M.R.

the Common Law Procedure Act, 1854, and the case of *Clow* v. *Harper* (1) and other cases were discussed. For my part, I decline to enter at all upon the discussion as to what *Clow* v. *Harper* (1) actually decided. I do not intend to say that anything said or intimated by the late Lord Chief Justice or myself in that case was wrong. I decline to enter upon the discussion, because it is clear to me that if any part of a case can be brought within s. 3 of the Common Law Procedure Act, 1854, it follows that it comes within s. 57 of the Judicature Act, 1873; so that, if any part is a matter of mere account, which can be referred under s. 3 of the earlier Act, the judge now has power, under s. 57 of the later Act, to refer all the issues in the cause. Now under s. 3 of the Common Law Procedure Act, 1854, a judge could not refer anything unless it was a matter of mere account, and such as could not conveniently be tried in the ordinary way in use at that time, namely, by a jury. Those two conditions were essential. Under s. 57 of the Judicature Act, 1873, in order that the judge may have power to order all the issues to be tried before an official referee, the cause or matter must be one requiring an examination of accounts, and that a prolonged examination, which cannot be conveniently made by a jury. Therefore, the moment you come to the conclusion that there is a matter of mere account which can be referred under s. 3 of the Common Law Procedure Act, 1854, it follows that the whole matter can be referred under s. 57 of the Judicature Act, 1873. I know that s. 3 of the Common Law Procedure Act, 1854, has not been repealed, but in my opinion the learning upon it has now become obsolete.

The question, therefore, is, is there here a matter of mere account which of itself could be referred? The defendant does not deny her liability for dilapidations; the only dispute is whether certain articles were or were not damaged or broken. That, in my opinion, is a matter of mere account, and so I cannot say that the judge had not jurisdiction to refer all the issues under s. 57 of the Judicature Act, 1873. How then ought we to deal with the case? If I had been at chambers I might perhaps have referred the question of account; though I do not

(1) 3 Ex. D. 198.

1887

KNIGHT v. COALES.

Lord Esher, M.R.

think that a jury would have had very great difficulty in dealing with it; but I should not have been disposed to refer the other question. As the judge, however, has exercised his discretion in the matter, and has not exercised it on any wrong principle, I must decline to interfere. No injustice will be done to the defendant by having the two questions tried together. The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitor for appellant: *Robert Wells.*

Solicitors for respondent: *Harvey & Capron.*

W. A.

HOWARTH *v.* BREARLEY.

June 11.

Medical Practitioner—Unregistered Assistant, Right of Registered Practitioner to recover for Services of—Medical Act, 1858 (21 & 22 *Vict. c.* 90), *ss.* 31, 32 —*Apothecaries Act* (55 *Geo.* 3, *c.* 194), *s.* 21.

A qualified medical practitioner, duly registered under the Medical Act, 1858, established a branch practice under the management of his brother, who was not so qualified or registered, and held no apothecaries' certificate under 55 Geo. 3, c. 194. In an action by the assignee of the qualified practitioner to recover charges for medical aid and advice rendered, and the cost of medicines supplied, to the defendant by the brother alone, without consulting the qualified practitioner:—

Held, that under ss. 31 and 32 of the Medical Act, 1858, the plaintiff was not entitled to recover.

MOTION by way of appeal from a decision of the judge of the Hundred Court at Salford.

Action by the plaintiff, as assignee for the benefit of the creditors of J. L. Fitzmaurice, to recover charges for medical attendance and services rendered to the defendant, and to recover the costs of medicines and drugs supplied to him.

The facts appearing from the judge's notes were shortly as follows:—J. L. Fitzmaurice was a duly qualified and registered medical practitioner practising at Bury. He had also a branch practice at Elton, which was managed by his brother, A. Fitzmaurice, who was not qualified to practise medicine or surgery, nor had he obtained a certificate enabling him to practise as an apothecary. In difficult cases A. Fitzmaurice consulted his

1887

HOWARTH v. BREARLEY.

brother, but A. Fitzmaurice had alone rendered the services and supplied the drugs, in respect of which the action was brought, to the defendant, and had not at any time consulted his brother about the defendant's case. All the drugs and medicines at the Elton branch were bought and paid for by J. L. Fitzmaurice.

At the trial the learned judge nonsuited the plaintiff, being of opinion that the Medical Act, 1858 (1) and the Apothecaries Act (55 Geo. 3, c. 94) (2), barred the plaintiff's right to recover.

T. Willes Chitty, for the plaintiff. A. Fitzmaurice was either the partner or the servant of J. L. Fitzmaurice, and in either case the latter could recover for the services rendered by the former. The Medical Act, 1858, does not make it illegal to employ an unqualified assistant, but only prohibits an unregistered practitioner from suing. The services of the assistant are those of his master. It is nearly always necessary for a medical man to employ an assistant to do part of his work, as much as it is for a solicitor to employ clerks, and a solicitor can always recover for the work done by his clerks, though no one may practise as a solicitor unless duly qualified. The cases shew that it is not illegal for a qualified man to have an unqualified partner or assistant, and that he may sue for the work done by the unqualified man: *Turner* v. *Reynall* (3); *De la Rosa* v. *Prieto* (4);

(1) 21 & 22 Vict. c. 90: The preamble of the Act states, that "it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners."

Sect. 31: "Every person registered under this Act shall be entitled according to his qualification or qualifications to practice medicine or surgery or medicine and surgery, as the case may be, ... and to demand and recover in any Court of law . . . . reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients."

Sect. 32: "No person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

(2) By 55 Geo. 3, c. 194, s. 20, a person is prohibited from acting as an apothecary without having obtained a certificate; and by s. 21: "No apothecary shall be allowed to recover any charges claimed by him in any Court of law unless he shall prove on the trial . . . . that he has obtained a certificate to practise."

(3) 14 C. B. (N.S.) 328.

(4) 16 C. B. (N.S.) 578.

Haffield v. *Mackenzie* (1); *Davies* v. *Makuna* (2). If *Leman* v. *Houseley* (3) is right, it only affects services rendered as an apothecary, and with respect to the claim for medicines supplied the learned judge at the trial ought to have inquired into those items, and distinguished between them and the charges for medical aid and advice.

C. A. Russell, for the respondent. If the brothers were partners the plaintiff cannot recover, because he is the assignee of one of them only. If the unqualified person was the servant of the qualified person, the plaintiff cannot recover, because, even assuming that a qualified man may employ an unqualified assistant, and recover for his services when he has really acted as assistant, and not upon his own authority only, the entire services in this case were rendered by the unqualified person without any reference whatever to the qualified person.

[He was stopped by the Court.]

LORD COLERIDGE, C.J. We have to decide whether the learned judge was right in nonsuiting the plaintiff. The relation between J. L. Fitzmaurice and his brother has not been very clearly defined; they were either partners, or master and servant. In effect, the duly qualified practitioner sues for services none of which he personally rendered. I do not mean simply that he did not physically render them, but that he gave no advice whatever in regard to, and never even saw, the defendant. If the qualified man had given advice, and the unqualified man had been merely the ministering hand under the directing brain of the qualified man, I should be prepared to hold that the services were those of the qualified man. I think that view consistent with common sense. But in this case we have to consider an Act of Parliament the provisions of which, in my opinion, put an end to the plaintiffs' right to sue. The Act says, "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied unless he shall prove

(1) 10 Ir. C. L. R. 289. (2) 29 Ch. D. 596.
(3) Law Rep. 10 Q. B. 66.

1887

HOWARTH v. BREARLEY.

Lord Coleridge, C.J.

upon the trial that he is registered under this Act." The qualified man who brought this action did prove that he was registered, but he sued for medical attendance, which he personally, in the sense I have already explained, did not render at all. The ground of my decision is that none of the services were rendered by the plaintiff, and that he cannot recover for services rendered without any reference to himself by another man who stood in this indefinite relation towards him. It is immaterial, I think, what that relation was, though perhaps it is safer to consider it as that of master and servant, and to say that the master cannot recover for services with no part of which he had anything to do. I do not think that any of the cases are in conflict with this view. A case which is the converse of this one, *De la Rosa* v. *Prieto* (1), shews strongly what the opinion of the Court would have been in this case. As to the earlier cases of *Turner* v. *Reynall* (2), and *Haffield* v. *Mackenzie* (3), if they are in conflict with the later cases, I prefer to follow the latter. I myself, sitting at nisi prius, would always have been extremely reluctant to follow *Turner* v. *Reynall* (2), for it seems to me to lay down the law contrary to the express purpose and intent of the Act, as is pointed out in *Leman* v. *Houseley*. (4) The later cases are more satisfactory to me than the earlier ones. For these reasons, upon the plain words of the Act, and upon the facts as found by the learned judge that the services were not rendered by the qualified man, I think that the nonsuit was right, and that this appeal must be dismissed.

DENMAN, J. I am of the same opinion. My Lord has dealt with the cases cited in argument, and I need not add more than that I concur in what he has said about *Turner* v. *Reynall* (2) and *Haffield* v. *Mackenzie*. (3) This action was brought to recover for services alleged to have been rendered by the plaintiff's assignor, who was a duly qualified practitioner. It is for the plaintiff to prove that they were so rendered. This he has not proved. He has only shewn that another person, without in any way consulting him, rendered them. The work, in my opinion, was not

(1) 16 C. B. (N.S.) 578.
(2) 14 C. B. (N.S.) 328.
(3) 10 Ir. C. L. R. 289.
(4) Law Rep. 10 Q. B. 66.

1887

HOWARTH v. BREARLEY.

Denman, J.

done for the patient by the qualified man, nor can the plaintiff in this case recover as for work done by the qualified man's servant. Looking at the Act, I think that a registered practitioner cannot give a roving authority to an unqualified person to practise in his name without consulting him or taking his advice, and then sue for the services rendered by the unqualified person. It would be entirely contrary to the purpose and intention of the Act. The services rendered by A. Fitzmaurice were in no way the services of J. L. Fitzmaurice.

Motion dismissed.

Solicitors for plaintiff: *Pritchard, Englefield, & Co., for Butcher, Bury.*

Solicitors for defendant: *Chester & Co., for Richardson, Bury.*

W. A.

EX PARTE REV. JAMES BELL COX.

May 16, 20; *July* 2.

Ecclesiastical Law—Church Discipline Act, 1840 (3 & 4 *Vict. c.* 86)—53 *Geo.* 3, *c.* 127—5 *Eliz. c.* 23—*Effect of Expiration of Sentence on Order of Suspension—Power to issue Significavit for Contempt—Writ de Contumace Capiendo.*

See XX Q.B.D. 1

In a proceeding in the Province of York a clerk in orders was accused of offences under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), and, being found guilty, an order was made by the official principal for his suspension ab officio for a period of six months. During this period he officiated in breach of his suspension. Afterwards during the six months his disobedience in respect of having so officiated was signified at the instance of the promoter, and after the expiration of the six months he was imprisoned under a writ de contumace capiendo:—

Held, that the imprisonment was illegal, as, the period of suspension under the order having expired, the order was no longer in force, and a writ de contumace capiendo could not be issued.

The writ de contumace capiendo was improperly indorsed "The Public Worship Regulation Act, 1874":—

Held, that this irregularity did not render the imprisonment illegal.

Dean v. *Green* (Law Rep. 8 P. D. 79) followed.

THIS was an application on behalf of the Rev. James Bell Cox, vicar of St. Margaret's, Toxteth Park, Liverpool, then detained a prisoner in Her Majesty's prison at Walton-on-the-Hill, Lancashire, for a writ of habeas corpus calling upon the governor of the gaol to bring the prisoner before the Court with a view to his discharge, on the ground that the committal had been illegal.

1887

EX PARTE REV. JAMES BELL COX.

In April, 1885, a suit was instituted under the Church Discipline Act of 1840 (3 & 4 Vict. c. 86), against the Rev. Mr. Bell Cox, charging him with offences against the ritual of the Church. The case was sent by the Bishop of Liverpool by letters of request to Lord Penzance, the official principal of the Province of York, and proceeded through its various stages, Mr. Cox not appearing at any stage. In the result Mr. Cox was condemned, and on August 19, 1885, a monition was issued directing him to refrain for the future from the illegal practices complained of. This monition Mr. Cox disobeyed, and in consequence, on June 13, 1886, a suspension was published and served on him, whereby he was suspended from his clerical office for six calendar months. Notwithstanding this suspension, he officiated in his church on June 20, 1886, and thereupon received a notice that an application would be made to Lord Penzance that his contempt should be signified to the Court of Chancery with a view to his committal. On July 30 a Court was held at York, before the Rev. Mr. Lane, the surrogate of Lord Penzance, who, by the direction of that learned judge, ordered a significavit to issue. The significavit was issued on August 5, and was received on the common law side of the Chancery Division on August 6, 1886. On the same day the Court granted a rule nisi, directed to the complainant and to the learned judge, for a prohibition to prevent the further proceedings in the suit. On March 11, 1887, this rule was discharged, and on the same day the significavit was sent by mittimus to the Chancellor of the County Palatine of Lancaster, within whose jurisdiction the living of St. Margaret's is situate, Mr. Cox in the meantime appealed to the Court of Appeal, and on April 28, 1887, his appeal was dismissed. On May 2, a writ de contumace capiendo was issued out of the Chancery of Lancaster, and on May 4 Mr. Cox was arrested and placed in the prison at Walton-on-the-Hill. The rule nisi for the habeas corpus was obtained on the ground that the arrest was illegal, first, because Mr. Cox at the date of the arrest was an unsuspended clerk, his sentence of six months' suspension having expired on December 13, 1886, and had been imprisoned for disobedience to an order of the ecclesiastical court which no longer existed at the time of the issue of the writ de contumace

capiendo; secondly, because under the statute 53 Geo. 3, c. 127, which establishes the procedure by significavit and writ de contumace capiendo, the learned judge must himself pronounce the clerk contumacious, and had no power to delegate that duty to another; thirdly, because a copy writ shewn by the sheriff in the exercise of his duty to Mr. Cox at the time of the arrest, was improperly indorsed with the words "The Public Worship Regulation Act, 1874," and was therefore irregular. Notice of the rule was ordered to be given to Lord Penzance and to the complainant.

Jeune, for the complainant. The principal point taken in favour of the incumbent is that, though his contumacy was duly signified to the Queen in Chancery, according to the form of significavit prescribed by 53 Geo. 3, c. 127, s. 1 (Schedule A), on August 6, 1886, and during the currency of the sentence of suspension, yet, because the writ de contumace capiendo itself, which according to that Act "thereupon shall issue," was prevented by these proceedings from issuing, as it otherwise would have done, as soon as the contumacy was signified, he is to escape liability, inasmuch as when the writ did in fact issue, a few days after the decision of the Court of Appeal, his sentence was at an end, and there was no longer any order of the Court left for him to disobey. This view of the effect of 53 Geo. 3, c. 127, and of 5 Eliz. c. 23, which is incorporated therewith, is erroneous. (1)

(1) The following are the material parts of 53 Geo. 3, c. 127 (ss. 1, 2, 3), and of the forms in the schedule thereto:—

The Act enacts (sect. 1), "that from and after the passing of this Act, excommunication together with all proceedings following thereupon shall in all cases, save those thereafter to be specified, be discontinued; and that in all cases which according to the law of this realm are cognisable in the ecclesiastical courts, *when any person or persons having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court, shall neglect or refuse to appear or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such court*, no sentence of excommunication shall be given or pronounced *save in the particular cases hereafter to be specified;* but instead thereof it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been com-

1887

EX PARTE REV. JAMES BELL COX.

The effect of these Acts is to make contumacy an ecclesiastical offence, and the incumbent, who had disobeyed the monition of

mitted, *to pronounce such person or persons contumacious and in contempt*, and within ten days to *signify* the same in the form to this Act annexed to His Majesty in Chancery, *as hath heretofore been done in signifying excommunications; and thereupon a writ de contumace capiendo in the form to this Act annexed shall issue from the Court of Chancery* . . . . and the same shall be returnable *in like manner as the writ de excommunicato capiendo* hath been by law returnable heretofore, and shall have the same force and effect as the said writ; and all rules and regulations not hereby altered, now by law applying to the said writ and the proceedings following thereupon, *and particularly the several provisions contained in a certain Act passed in the fifth year of Queen Elizabeth, intituled an Act for the due execution of the writ de excommunicato capiendo, shall extend and be applied to the said writ de contumace capiendo and the proceedings following thereupon as if the same were herein particularly repeated and enacted*; . . . . and *upon the appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the court, the judges or judge of such ecclesiastical court shall pronounce such party absolved from the contumacy or contempt aforesaid, and shall forth with make an order . . . . in the form to this Act annexed, for discharging such party out of custody.*" Sect. 2: "Provided always . . . . that nothing in this Act contained shall prevent any ecclesiastical court from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, *such sentences or decrees being pronounced as spiritual censures for offences of ecclesiastical cognizance*, in the same manner as such court might lawfully have pronounced or declared the same had this Act not been passed." Sect. 3: "And be it further enacted that no person who shall be so pronounced or declared excommunicate shall incur any civil penalty or incapacity in consequence of such excommunication, save such imprisonment, not exceeding six months, as the Court pronouncing or declaring such person excommunicate shall direct; and in such case the said excommunication and the term of such imprisonment shall be signified or certified to His Majesty in Chancery in the same manner as excommunications have been heretofore signified, and thereupon the writ de excommunicato capiendo shall issue, and the usual proceedings shall be had, and the party being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such ecclesiastical court." Schedules to which this Act refers: (A.) Significavit of party being contumacious and in contempt . . . . "We hereby notify and signify to your Majesty, that one . . . . hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical in not (as the case may be) appearing before (here set out the style of the ecclesiastical judge or his representa-

an ecclesiastical court, after the expiration of his sentence of suspension, was none the less a contumacious person in the ecclesiastical sense, and liable to arrest. When once an incumbent has committed an act of contumacy he is liable to be accused of contumacy and to be imprisoned as a contumacious person. The Act 53 Geo. 3, c. 127, substitutes proceedings for contumacy in the place of those formerly used in cases of excommunication, and creates a new legal status, that of a contumacious person in place of that of a person excommunicate. It specifies three offences: (1) "neglect or refusal to appear;" (2) "neglect or refusal to pay obedience to lawful orders or decrees;" (3) "a contempt in the face of the Court," in respect of which excommunication is abrogated, but instead the Court is "to pronounce such person as contumacious and in contempt," and then a significavit is to issue and arrest under the writ de contumace capiendo is to follow. It also provides that in case of submission the Court shall "pronounce such party absolved from the contumacy and contempt," and shall make an order for his discharge from

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tive), or in not obeying the lawful commands (here set out the commands) of (such judge or representative), or in having committed a contempt in the face of the court of (such judge or representative) lawfully authorized by (here set out the nature and manner of such contempt), *on a day and hour now long past*, in a certain cause of" . . . . (B.) Writ de contumace capiendo. . . . . "Is manifestly contumacious and contemns the jurisdiction and authority of (here fully state the non-appearance, disobedience, together with the commands disobeyed, or the contempt in the face of the court, as may be), nor will he submit to the ecclesiastical jurisdiction . . . . We command you that you attach the said . . . . by his body, *until he shall have made satisfaction for the said contempt.*" (C.) Writ of deliverance. "For contumacy . . . . attached by his body until he should have made satisfaction for the contempt: Now he having submitted himself and satisfied the said contempt, we hereby empower and command you," &c.

The Act 5 Eliz. c. 23, s. 10, reserved "to all archbishops and bishops, and all others having authority to certify any person excommunicated, like authority to accept and receive the submission and satisfaction of the said person so excommunicated in manner and form heretofore used, and him to absolve and release, and the same to signify as heretofore it hath been accustomed to the Queen's Majesty, her heirs and successors, into the High Court of Chancery, and thereupon to have such writs for the deliverance of the said person, so absolved and released, from the sheriff's custody or prison, as heretofore they or any of them had, or of right ought or might have had."

1887

Ex parte Rev. James Bell Cox.

custody. In the significavit (Schedule A.) the person to be imprisoned is described as having been "duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical." In the writ de contumace capiendo (Schedule B.) he "is manifestly contumacious and contemns the jurisdiction of the Court," and is to be "attached until he shall have made satisfaction for the said contempt." In the writ of deliverance (Schedule C.) he is described as having "submitted himself and satisfied the said contempt." The offence of contumacy, therefore, continues, and the guilty person is liable to arrest until he has "submitted himself and satisfied the contempt" of which he has been guilty.

It is said on behalf of Mr. Cox that he cannot make submission, because it is impossible to obey a suspension which is at an end; but his former disobedience has none the less rendered him a contumacious person, and as such liable to arrest. The incumbent remains guilty of contumacy though in respect of a contempt which is long past.

"Obedience" and "absolution" are both technical terms derived from the proceedings in excommunication. Excommunication could only be got rid of by "absolution," and "absolution" could only be given upon "submission" and profession of obedience, which is "obedience" in the ecclesiastical sense. "Contumacy" continues until it is formally purged by "obedience." The course of the contumacious person is to declare himself an obedient person in the technical and ecclesiastical sense. He is then no longer an offender, and is entitled to the benefit of the writ of deliverance. The incorporated Act, 5 Eliz. c. 23, by s. 10 expressly reserves to bishops and others having power to excommunicate "authority to accept and receive submission and satisfaction." The section mentions certain "writs for the deliverance of the said person so absolved and released." These writs used the language "factâ satisfactione aut præstitâ cautione prout moris est de parendo mandatis ecclesiæ," and the ordinaries often accepted an oath of obedience "de parendo juri et standō mandatis ecclesiæ in formâ juris" as a sufficient "caution." There was also, in consequence of the civil disabilities under which persons excommunicated laboured, a remedy at com-

mon law. If the bishop neglected to "assoil" the "contemner of the keys" after the tender of a proper "caution," a writ "de cautione admittendâ" issued, neglect of which rendered the bishop liable to indictment as well as to civil proceedings: Coke, 2 Inst. 623; Fitzherbert, De Naturâ Brevium, 63; Phillimore's Ecclesiastical Law (Ecclesiastical Censures), 2, 1414.

In the subsequent Act, 2 & 3 Wm. 4, c. 93, which extends the operation of 53 Geo. 3, c, 127 to Ireland, "submission" is evidently the essential matter. (1) In *Baker* v. *Thorogood* (2) Dr. Lushington pointed out that the proper course for the contumacious person was "to submit himself to the jurisdiction of the Court, and take an oath of obedience to the lawful commands of the Ordinary." This is ecclesiastical "submission." It is true that in *Dean* v. *Green* (3) Lord Penzance directed the release of a clergyman proceeded against under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 83), who had been imprisoned under a writ de contumace capiendo issued pursuant to 53 Geo. 3, c. 127, without exacting any formal "submission"; but that case was not really argued.

[A. L. SMITH, J. That decision is in favour of Mr. Cox. By the operation of the Public Worship Regulation Act, Mr. Green became deprived of his benefice. From that moment the sentence of suspension was a nullity. Lord Penzance treated it as having expired, and ordered a writ of deliverance to issue.]

Such a view is opposed to that of Dr. Lushington in *Baker* v. *Thorogood*. (2)

[LORD COLERIDGE, C.J. Is there any authority for exacting an oath of obedience?]

In *Bishop of Exeter* v. *Starr* (4), decided in 23 & 24 Car. 2, in the King's Bench before Sir Matthew Hale, it is said that one of the "cautions," under the Canon Law is "cautio juratoria," "whereby the party makes oath to perform the sentence of the

(1) The words used differ slightly: "Upon the due appearance of the party or parties so cited and not having obeyed as aforesaid, or the due submission of the party or parties so having committed a contempt in the face of the Court . . . or otherwise . . . the judge shall pronounce such party or parties absolved from the contumacy and contempt aforesaid."—2 & 3 Wm. 4, c. 93, s. 1.

(2) 2 Curt. Eccl. Rep. 632.

(3) 8 P. D. 79.

(4) 2 Lev. 36.

1887

EX PARTE REV. JAMES BELL COX.

Court:" Fitzherbert, De Naturâ Brevium, p. 63; Phillimore, Eccl. Law, 2, 1414.

In the temporal Courts contempt is punished by imprisonment till it is purged. This is the case with a man marrying a ward of Chancery, a witness called on his subpœnâ, a party ordered to pay money by a certain day. The suggested limitation of the writ de contumace capiendo is a serious abridgment of ecclesiastical process.

The point as to Lord Penzance having employed a surrogate is covered by the decision of this Court upheld in the Court of Appeal in the proceedings for prohibition. The proceedings at York were not irregular. See the rules of the Chancery framed in September, 1885, and May, 1886. (1)

The description of the cause in the body of the writ was in conformity with the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), and it is immaterial that a mistake was made in the indorsement, especially as there was no obligation on the sheriff to shew the writ to the defendant.

Sir E. Clarke, Q.C., S.G. (*R. S. Wright* and *Danckwerts*, with him), for Lord Penzance and the governor of the gaol. The order in question was made by Lord Penzance personally after consideration of the case, and in no sense by the surrogate, who was merely employed to read the order in Court. As to the governor of the gaol, in *Moore* v. *Magan* (2), a statute required a true copy of the capias to be delivered to the defendant, but there is nothing to this effect in 53 Geo. 3, c. 127, or in 5 Eliz. c. 23.

[It was intimated that proceedings would not under any circumstances be taken against the governor of the gaol.]

Charles, Q.C., and *Sir Walter Phillimore* (*Beaumont*, with them), in support of the rule. The writ de contumace capiendo has in this case issued not as a punishment of a past offence, but to enforce an existing sentence. Under s. 1 of 53 Geo. 3, c. 127, of which the forms in the schedule are, as Lord Cottenham held in *Re Baines* (3), in no sense part, the writ issues simply as a confirmation of a sentence, and where, as here, there is no sentence, no writ can issue. The argument for the promoter really refers

(1) Printed in 11 P. D. pp. 183, 186. (2) 16 M. & W. 95.
(3) 1 Cr. & P. 31.

to ss. 2 and 3 of this Act, which relate to the procedure in cases of excommunication as a matter of spiritual censure. Sect. 3 renders persons so excommunicate liable to six months' imprisonment as a punishment. See *Hoile* v. *Scales* (1), in which a person excommunicated under 5 & 6 Edw. 6, c. 4, s. 2, for the offence of smiting in a sacred place was sentenced to imprisonment *under this third section*. Many significavits are to be met with in the Petty Bag Office which relate to matters under this section, such as alimony, payment of church rates, and spiritual defamation. But the proceedings under the first section are merely to enforce obedience, and here there is no order to obey.

In *Reg.* v. *Thorogood* (2) the Court of Queen's Bench say of s. 1: "Imprisonment is not inflicted on this occasion by way of penalty, but merely for enforcing execution of the sentence pronounced by the Court." Similarly in *Hudson* v. *Tooth* (3), Lord Penzance, in ordering the release of a clergyman imprisoned under s. 1, said that the writ had been applied for "not to punish for the past but to enforce obedience for the future." Again, in *Dean* v. *Green* (4), in which the jurisdiction under s. 1 was carefully considered by Lord Penzance, a release was ordered because "the imprisonment is obviously intended to enforce obedience," and "the order of the Court can no longer be obeyed or disobeyed." If Dr. Lushington was not referring in the dicta in *Baker* v. *Thorogood* (5) to spiritual censures under ss. 2 and 3, he meant that the oath of obedience should be taken during the currency of the sentence. Sect. 10 of 5 Eliz. c. 23, which relates to the power of bishops, is either not incorporated with 53 Geo. 3, c. 127, or it is to be read in connection with ss. 2 and 3, and refers to cases of spiritual censure. In 2 & 3 Wm. 4, c. 93, s. 1, the words "or otherwise" seem to imply that a release can be obtained without "submission" under 53 Geo. 3, c. 127.

The words in the significavit "on a day and hour long past," refer to the forty days which by custom were suffered to elapse between sentence of excommunication and the issue of the writ de excommunicato capiendo: 2 Phillimore, Eccl. Law, 1403.

(1) 2 Hagg. Eccl. Rep. 566.
(2) 12 Ad. & E. 183, at p. 196.
(3) 2 P. D. 125, at p. 139.
(4) 8 P. D. 79.
(5) 2 Curt. Eccl. Rep. 632.

1887

EX PARTE REV. JAMES BELL COX.

[LORD COLERIDGE. A sentence, then, so short that it can be exhausted in proceedings for prohibition and applications for a habeas corpus, is always liable to be successfully defied.]

The incumbent is still liable to punishment by suspension.

[The Court intimated that they regarded the point as to the employment of a surrogate involved in their previous decision and that of the Court of Appeal.]

Whenever it is not otherwise provided by law, it is the duty of the sheriff to produce his authority for arresting.

July 2. The judgment of the Court (1) was read by

A. L. SMITH, J. In this case a rule nisi for a habeas corpus was obtained to shew cause why the Rev. James Bell Cox should not be discharged from custody. The rule came on for argument before the Lord Chief Justice and myself on May 20 last, when we made the rule absolute for the release of Mr. Cox, but took time to put our reasons for so doing into writing.

The facts of the case, so far as they are material, are as follows: In the year 1885 proceedings were taken against the Rev. James Bell Cox for offences against ritual under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86) by Mr. Hakes, of which offences Mr. Cox was found guilty. On September 5, 1885, a monition was served upon Mr. Cox admonishing him to desist from the practices of which he had been found guilty, which monition Mr. Cox disobeyed. For this disobedience, on June 13, 1886, Mr. Cox was suspended by Lord Penzance ab officio for the period of six months. The term would consequently expire on December 13, 1886. Whilst so suspended, viz., on June 20, 1886, Mr. Cox, in breach of such suspension, officiated in his church of St. Margaret's, Liverpool, and on July 30, 1886, he was adjudged by Lord Penzance to have so acted. On August 5, 1886, the disobedience of Mr. Cox to the order of suspension was duly signified to Her Majesty in Chancery. Up to this date Mr. Cox had abstained from appearing in the suit, and had taken no part therein. Upon the same day upon which the significavit issued, viz., August 5, 1886, Mr. Cox obtained from the Queen's Bench Division a rule nisi for a prohibition calling upon Lord Penzance

(1) Lord Coleridge, C.J., and A. L. Smith, J.

and Mr. Hakes to shew cause why further proceedings in the suit should not be restrained. It is not here necessary to state the grounds upon which this rule nisi was obtained; suffice it to say, the rule came on for argument on March 11, 1887, when it was discharged by the Queen's Bench Division with costs, which judgment was affirmed on appeal April 28, 1887.

On May 2, 1887, a writ de contumace capiendo was obtained by Mr. Hakes, and Mr. Cox was arrested and imprisoned in Her Majesty's prison at Walton-on-the-Hill.

The question is, whether after the order of suspension ab officio for six months had expired, as it did on December 13, 1886, the writ de contumace capiendo could be lawfully issued, the order for the disobedience to which Mr. Cox had been signified being no longer in existence.

This depends upon the true construction of the 53 Geo. 3, c. 127, for it was under this statute that the proceedings to imprison Mr. Cox were necessarily taken. The statute by s. 1 enacts as follows; viz., "that excommunication together with all proceedings following thereupon shall in all cases, save those in the Act specified (the present is not one of them), be discontinued, and that in all cases cognizable in the Ecclesiastical Courts (*a*) when any person duly cited to appear in any Ecclesiastical Court shall neglect or refuse to appear, (*b*) when any person required to comply with the lawful order of any such Court shall neglect or refuse to pay obedience to such lawful order, (*c*) when any person shall commit a contempt in the face of such Court, no sentence of excommunication shall be given or pronounced (save in the particular cases therein specified), but instead thereof it shall be lawful to pronounce such person contumacious and in contempt, and within ten days to signify the same to His Majesty in Chancery, and thereupon a writ de contumace capiendo in the form to the Act annexed shall issue from the Court of Chancery, and that all rules and regulations not by the Act altered then by law applying to the writ de excommunicato capiendo shall extend and be applied to the writ de contumace capiendo, and that (*a*) upon the due appearance of the party so cited and not having appeared, (*b*) upon the obedience of the party so cited and not having obeyed, (*c*) upon the due submission of the party so having

1887

Ex parte Rev. James Bell Cox.

A. L. Smith, J.

committed a contempt in the face of the Court, the judge of the Court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff for his discharge in the form to the Act annexed."

This is the statute: what does it mean? The words of the 1st section appear to us unambiguous. They are as follows: (*a*) when the party who has neglected to appear appears; (*b*) when the party who has disobeyed an order obeys; (*c*) when the party who has committed a contempt in the face of the Court submits, then he shall be entitled to his discharge.

But it was said by Mr. Jeune on behalf of Mr. Hakes that, in addition to appearing, obeying or submitting, as the case may be, the party imprisoned is not to be discharged until he has made amends for the contempt of which he has been adjudged guilty, or, in other words, until he has done something in addition to the appearing, obeying, or submitting, as prescribed by the statute. He argued that the statute enacted punishment for past offences committed, and that until such offence had been purged by contrition for the past, as well as by promise to obey in the future, the party was not entitled to his discharge.

In our judgment this is not the meaning of the statute. Take the first case; viz., appearing when he had previously neglected or refused to appear. What the statute enacts is, that upon appearance he shall be entitled to be discharged. Why is he to do more? The statute does not say so, and says nothing about purging past offences. Take the second case; obedience to a lawful order after having neglected or refused to obey. Again, we ask, why is he to do more than what the statute says he is to do to entitle him to his discharge? As to the third case, viz., contempt in the face of the Court, in this instance the statute does enact that the party is to submit, but it should be noticed that in neither of the other cases is submission in any shape or form required. It is solely appearance in the one case and obedience in the other. The words used in 5 Eliz. c. 23, s. 10, viz. "submission and satisfaction," are nowhere used in the Act of George III. excepting the word "submit" as applying to a contempt in the face of the Court.

In our judgment Mr. Charles, on behalf of Mr. Cox, put the

right construction upon the statute when he insisted that the object and provisions of s. 1 of the statute were to enforce and compel obedience in the future to the proceedings and orders of the Court, and not to punish for past acts which when once done never could be undone. Punishments are retained by ss. 2 and 3 of the Act, but these sections have no application to the present case. Assume a suit and all proceedings thereunder, in which a party had neglected or refused to appear, to have terminated and the party in prison for not having appeared. How is he to get out of prison? Ex hypothesi he cannot appear. There is nothing left to appear to. Then how is he to get his discharge? He could not, unless it were held, as we hold, that when the suit had terminated any imprisonment thereunder also terminated. The same observation applies with equal force when no order any longer exists which a party in prison can by possibility obey. In our judgment the true construction of the statute is that, as soon as no suit exists to which a party can appear, or no order exists which he can obey, the party is entitled to his discharge, for from that moment the object of the statute in imprisoning, viz., to compel obedience in the future, has come to an end, and from that time the party imprisoned is entitled to his discharge. It follows from this that inasmuch as no imprisonment can continue after the order, for disobedience to which a party has been signified, has come to an end, so also can no proceedings by way of imprisonment take place after such order has come to an end.

Apart from the cases, this is, in our judgment, the true reading of the statute. But what do the cases say? The first to which we will refer is *Reg.* v. *Thorogood* (1), where it was held by the full Court of Queen's Bench that under the statute (53 Geo. 3, c. 127) imprisonment was not inflicted by way of penalty, but merely for enforcing execution of the sentence pronounced by the Court. The Court also stated that the decisions on the Act of Elizabeth threw little light upon the Act of Geo. 3, but that its own language was clear. In this we entirely agree. In *Hudson* v. *Tooth* (2) Lord Penzance lays down the purposes for which an inhibition is granted. That learned judge there states that it is granted not to punish the clerk for the past but to

(1) 12 Ad. & E. 183. (2) 2 P. D. 125, at p. 137.

1887

EX PARTE REV. JAMES BELL COX.

A. L. Smith, J.

enforce obedience for the future. "It was," said Lord Penzance, "in the clerk's power at any moment after his arrest to regain his liberty, and not only that, but to get rid of the inhibition and be restored to the exercise of his duties if he were willing to undertake to discontinue the practices complained of." We now come to the case of *Dean* v. *Green* (1), which Mr. Jeune, for Mr. Hakes, had to admit was strongly in point and adverse to his contention, but he urged that the judgment of Lord Penzance therein was inconsistent with the judgment of Dr. Lushington in *Baker* v. *Thorogood* (2), and he insisted that the latter case was to be preferred. In *Dean* v. *Green* (1) Lord Penzance undoubtedly held, as it seems to us, that when the order suspending or inhibiting a clerk for disobedience to which he was imprisoned, came to an end, then, inasmuch as there was no order extant which he could either obey or disobey, the clerk was entitled, under 53 Geo. 3, c. 127, to his discharge, In *Baker* v. *Thorogood* (2) Dr. Lushington held that to entitle a person committed for contempt to be discharged, it was incumbent upon him to purge his contempt, and that this could only be done on payment of the costs incurred in consequence of his contempt and on his taking the usual oath to submit to the lawful commands of his ordinary. It must be noticed that the point now under discussion, viz., whether an imprisoned clerk is entitled to his discharge when the order which he has disobeyed, and for disobedience to which he is in custody, no longer exists, was not before Dr. Lushington, whereas it was directly before Lord Penzance, and in our opinion the judgment of Lord Penzance is in point, and gives the true construction of the statute, whereas the judgment of Dr. Lushington does not apply to the case in hand. As to the argument addressed to us upon the form of the schedules to the Act of George III., we have nothing to add to and adopt what was said by Lord Cottenham in the case of *Re Baines* (3) and Lord Penzance in *Dean* v. *Green*. (4)

In our judgment the order of suspension ab officio which Mr. Cox disobeyed, and for which he was signified, having expired on December 13, 1886, there was, on May 2, 1887, no order

(1) 8 P. D. 79.
(2) 2 Curt. Eccl. Rep. 632.
(3) 1 Cr. & P. 31.
(4) 8 P. D. pp. 89, 90.

which he could possibly obey then existing, and consequently the writ de contumace capiendo was improperly issued upon that day.

For the reasons above given we are of opinion that the rule nisi for a habeas corpus must be made absolute.

Two other subsidiary points were taken for Mr. Cox. One was that the judgment of Lord Penzance on July 30, 1886, adjudicating Mr. Cox to have disobeyed the order of suspension on June 13, 1886, was invalid, by reason of such judgment being delivered by the mouth of his surrogate and not by Lord Penzance, present himself in person in the province of York. This point was dealt with and determined adversely to Mr. Cox in the proceedings by way of prohibition above mentioned, and is concluded thereby. The other point was, that the writ de contumace was bad, because although upon its face it was an order, it had upon its back a reference to the Public Worship Regulation Act, 1874, and it was said this made the arrest of Mr. Cox illegal. This indorsement had been inadvertently placed upon the writ by the Vice-Chancellor of the County Palatine when he tested it. In the first place, it must be pointed out that the warrant upon which Mr. Cox was taken into custody was in order. Mr. Cox was not entitled as of right to see the writ upon which the warrant issued at all, and what is more, no statute required that any indorsement whatever should be upon the writ. In our judgment there is nothing technical or otherwise in the point, and it absolutely fails.

The rule for habeas corpus, as we have before decided, must be made absolute. There will be no costs on any side.

Rule absolute.

Solicitors for Mr. Cox: *Brooks, Jenkins & Co.*

Solicitor for promoter: *Girdleston.*

Solicitor for Lord Penzance and the governor of the gaol: *Solicitor to the Treasury.*

H. D. W.

1887
July 19.

THE QUEEN *v.* ROBINSON.

Coroner—Jurisdiction—Prison for County—Inquest on Prisoner—Coroner for County—Prison Acts, 1865 *and* 1877 (28 *&* 29 *Vict. c.* 126, *ss.* 48, 57, *and* 40 *&* 41 *Vict. c.* 21, *s.* 30)—*Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 171, *sub-s.* 1, *s.* 228, *sub-s.* 4.

Notwithstanding the transfer of prisons to the Secretary of State by the Prison Act, 1877, a prison, as to which no rules have been made under s. 30 of that Act, and which at the commencement of the Prison Act, 1865, was a prison belonging to a county, is still the county prison, although locally situate within the limits of a city, and therefore the jurisdiction to hold inquests on prisoners dying in such prison is in the coroner for the county, and not in the coroner for the city, and such jurisdiction is not affected by s. 171, sub-s. 1, of the Municipal Corporations Act, 1882.

A RULE NISI had been obtained on behalf of the coroner for the city of Oxford, calling upon the coroner for the central district of the county of Oxford to shew cause why a writ of certiorari should not issue to bring up and quash two inquisitions, held in July, 1886, and May, 1887, respectively, by the coroner for the central district of the county, on the bodies of prisoners who had died in Oxford Castle.

By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 48: "It shall be the duty of the coroner having jurisdiction in the place to which the prison belongs to hold an inquest on the body of every prisoner who may die within the prison."

By s. 57: "Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison."

When that Act came into operation (February 1, 1866), Oxford Castle, which is situate within the limits of the city of Oxford, was the prison for the county of Oxford, and there was a separate prison for the city.

By the Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 4, 5, expenses incurred in respect of the maintenance of prisons to which that Act applies (which include prisons belonging to counties), and of the prisoners therein, are to be defrayed out of moneys

provided by Parliament, and such prisons are transferred to and vested in the Secretary of State.

By s. 48: "The legal estate in every prison to which this Act applies . . . shall . . . be deemed to be vested in the Prison Commissioners, and not in the Secretary of State, but shall from time to time be disposed of by such Commissioners in such mode as the Secretary of State, with the consent of the Treasury, may direct."

By s. 30 the Secretary of State may make rules as to prisons, and until such rules are made the transfer under that Act of prisons shall not affect the jurisdiction of any coroner.

No rules have been made as to Oxford Castle.

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 171, sub-s. (1) provides for the appointment of coroners of boroughs, and that "no person other than the coroner so appointed shall take in the borough any inquisition belonging to the office of coroner."

By s. 228, sub-s. (4): "Any gaol . . . which at the commencement of this Act is parcel of a county shall continue to be parcel of the county."

J. Ashton Cross, shewed cause. These inquisitions were properly held by the coroner for the county. The county is "the place to which the prison belongs," within the meaning of s. 48 of the Prison Act, 1865, and therefore he had jurisdiction. The provisions of that Act still apply, for no rules have been made under s. 30 of the Prison Act, 1877, relating to this prison, and, therefore, by the express terms of that section the coroner's jurisdiction is not affected. Sect. 171, sub-s. 1, of the Municipal Corporations Act, 1882, does not apply, for by s. 57 of the Prison Act, 1865, the prison "shall for all purposes be deemed to be within the limits of the place for which it is used as a prison," —that is, the county of Oxford, not the city—and by s. 228, sub-s. 4, of the same Act of 1882, the prison continues to be parcel of the county.

Melsheimer, in support of the rule. The prison no longer belongs to the county, for by the Prison Act, 1877, s. 48, the legal estate in it is vested in the Prison Commissioners.

1887

THE QUEEN v. ROBINSON.

[WILLS, J. The words are, "shall be deemed to be vested," not "shall be vested."]

The effect of the Act of 1877 has been to abolish county prisons as such, and therefore there is now no such thing as a prison belonging to a county within the meaning of s. 48 of the Act of 1865. If this is not so, the jurisdiction is taken away from the coroner for the county by s. 171 of the Municipal Corporations Act, 1882.

STEPHEN, J. I am of opinion that the proper interpretation of these statutes is that suggested by Mr. Cross, not that suggested by Mr. Melsheimer. The effect of ss. 48 and 57 of the Prison Act, 1865, is to give the county coroner jurisdiction in the prison which was then used as the prison for the county of Oxford, and I do not think that the Prison Act, 1877, alters this state of affairs. Mr. Melsheimer contends that the effect of the Act of 1877 was to sweep away county prisons, and that there is now no such thing as a county prison. I do not agree with that view, the adoption of which would give rise to very serious inconvenience. I think the Prison Act, 1865, gives jurisdiction to the coroner for the central district of the county of Oxford in the present case, and that such jurisdiction is not taken away by the Prison Act, 1877. I also think that the jurisdiction so given is not taken away by s. 171 of the Municipal Corporations Act, 1882, because the county coroner taking an inquisition within the prison is not taking it in the borough within the meaning of that section, but in the county. I am, therefore, of opinion that the rule ought to be discharged.

WILLS, J. I am of the same opinion. Sect. 48 of the Prison Act, 1865, provides that these inquests shall be held by "the coroner having jurisdiction in the place to which the prison belongs." That is founded on the notion that the prison belongs to some place. Then, by s. 57, "Every prison wheresoever situate shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." It is somewhat difficult to say what the exact meaning of this latter section would be in all cases, for there are places where the same prison was used both as the county and as the borough gaol. I think, however,

that where there is a prison "belonging to" a place within the meaning of s. 48, then s. 57 certainly does not interfere with the operation of s. 48. But it is said that the position of affairs was altered by the Prison Act, 1877. I do not think this is so. I think the argument in support of the view suggested shews why the word "transferred" is used in s. 5 of that Act, and why s. 48 of the same Act provides that the legal estate in prisons "shall be deemed to be vested in the Prison Commissioners." The legislature were taking care that the county prison should not cease to be the county prison. The jurisdiction to commit to the county gaol in general remains as it was at common law. There was a general jurisdiction at common law to commit persons, either for detention before trial, or after trial for punishment, to the county prison in respect of offences committed in the county. Mr. Melsheimer's argument suggests that the county gaol has ceased to exist. If that is so, most commitments which are now made are meaningless, for they are in terms commitments to the county gaol. I think the qualities of the prison as a county gaol, and its use as such, except so far as they have been infringed upon by Acts of Parliament, remain as they existed at common law. There is a fiction that the estate in the prison is in the Prison Commissioners, but it remains the gaol belonging to the county. Then it is said that s. 171, sub-s. 1, of the Municipal Corporations Act, 1882, makes the city coroner the proper officer to take these inquisitions, but this prison is not in the city of Oxford within the meaning of that section, for when it was created the county gaol it ceased to be part of the city. It was used as a prison for the county within the meaning of s. 57 of the Prison Act, 1865, and for the county only; for when that Act came into operation it was not used as the prison for the city. It was, therefore, for all purposes to be deemed to be within the limits of the county, and was in fact the county goal of the county of Oxford; and s. 171 of the Municipal Corporations Act, 1882, has no application to it, for it is not in the city of Oxford. By s. 228, sub.-s. 4, of the Act of 1882, any gaol which then was parcel of a county is to continue to be parcel of the county as if the Act had not been passed, and so its legal status as parcel of the county is expressly preserved.

1887

THE QUEEN v. ROBINSON.

For these reasons I am of opinion that the inquisitions in question were rightly held by the county coroner.

Rule discharged.

Solicitor for the city coroner: *Charles Mallam, for Thomas Mallam & Co., Oxford.*

Solicitors for the county coroner: *Prior, Church & Adams, for W. W. Robinson, Oxford.*

P. B. H.

July 14.

THE ATTORNEY-GENERAL *v.* HEYWOOD AND OTHERS.

Revenue—Stamp Duties on Accounts—Voluntary Settlement—Interest for Life—Reservation to Settlor—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*).

By a voluntary settlement the settlor assigned to trustees a sum of money, with interest, upon certain trusts, and subject to certain powers, provisoes, agreements and declarations, and it was declared that the trustees should apply the income for the benefit of the settlor and his wife and children, or, at their discretion, for the benefit of one or more of such persons to the exclusion of the others, and after the settlor's death the money was to be held subject to trusts in favour of his widow and children:—

Held, that, notwithstanding the power conferred upon the trustees of depriving the settlor of the benefit of the settled property at their discretion, an interest in such property for life was reserved to the settlor, within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and therefore on his death duty was payable.

INFORMATION by the Attorney General, claiming delivery of an account and payment of duty under ss. 38 and 39 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12) (1), in respect

(1) By the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27, stamp duties are imposed on the affidavit to be required and received from persons applying for probate or letters of administration.

By s. 38: "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—

* * *

(*c*) "Any property passing under any past or future voluntary settlement made by any person dying on or after such day" (June 1, 1881) "by deed or any other instrument not taking effect as a will, whereby an interest in such

of the property passing under a voluntary settlement on the death of the settlor Edmund Peel.

By the indenture of settlement, which was dated June 15, 1878, and was made between Edmund Peel and Jessie Ann his wife, of the one part, and the defendants Edward Stanley Heywood, George James Playfair, William Smoult Playfair, and Sydney Peel, of the other part, Edmund Peel assigned to the defendants the principal sum of 43,000*l.*, belonging to him, and then in the hands of the firm of John Peel & Co. of Manchester, and the interest then due and thenceforth to become due for the same, to hold upon the trusts, and with and subject to the powers, provisoes, agreements and declarations thereinafter declared and contained.

Among other provisions it was agreed and declared that the trustees or trustee for the time being should during the life of Edmund Peel pay or apply the income of the 43,000*l.*, or of the stocks, funds, or securities for the time being representing the same or any part thereof, in their or his discretion, as the same should become payable, and without anticipation, for or towards the benefit, maintenance and personal support of Edmund Peel and his wife Jessie Ann Peel, or any future wife, and of the child or children or other issue of Edmund Peel for the time being in existence (whether by Jessie Ann Peel or by any future wife), or, at the discretion of the trustees or trustee for the time being, for or towards the benefit, maintenance, and personal support, of such one or more to the exclusion of the others or other of such objects of the present discretionary trust or power as the trustees or trustee for the time being should think proper, and should during the life of Edmund Peel accumulate the residue (if any) of the same income in the way of compound interest by investing the same and the resulting income thereof from time to time in some of the stocks, funds, or securities thereinbefore specified, for the

property for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

1887

ATTORNEY GENERAL v. HEYWOOD.

benefit of the person or persons who under the trusts therein declared might become entitled thereto, but nevertheless such accumulation should not be made or continued after the expiration of twenty-one years from the date of the settlement.

The property was to be held after the death of Edmund Peel subject to certain trusts in favour of his widow and children.

From the date of the settlement until his death Edmund Peel received the income of the funds comprised in the settlement. He died on June 9, 1885.

Sir Richard Webster, A.G., and *Vaughan Hawkins* (*Sir Edward Clarke, S.G.*, with them), for the Crown. The effect of this settlement was to reserve to the settlor an interest for life in the settled property, within the meaning of s. 38, sub-s. 2 (*c*) of the Customs and Inland Revenue Act, 1881, and therefore the duty imposed by that Act is payable. In delivering judgment in *Burrough* v. *Philcox* (1) Lord Cottenham said: "When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class." This shews that in the present case if twenty-one years had elapsed, during the settlor's life, without any appointment having been made, the Court would have distributed the fund among the class designated in the settlement, of whom the settlor was one. It follows that a life interest was reserved to him by implication. The settlement conferred on the trustees a power in the nature of a trust (Lewin on Trusts, 8th ed., 600, 834), and each member of a class in whose favour such a power is created takes an interest.

Reid, Q.C., and *M. G. Davidson*, for the defendants. All that was reserved to the settlor here was a mere possibility or contingency, which is not an interest. The decision in *Holmes* v. *Penney* (2) shews conclusively that this settlement conferred no interest. In that case Wood, V.C., said: "I cannot find any instance in which the debtor himself, whose property is sought to be affected by a suit of this kind, has been capable of taking an

(1) 5 My. & Cr. 72, at p. 92. (2) 3 K. & J. 90.

interest in the manner provided by this deed. C. J. Penney does not take an actual interest under the deed. If he did, of course that might be attached by creditors; but there is an option given to the trustees to dispose of the property for the benefit of C. J. Penney, if they shall think fit. One of the trusts of the deed is, during the life of the said C. J. Penney to pay, apply, lay out and expend the dividends or annual produce of the fund in and towards the maintenance, clothing, lodging, and support of the said C. J. Penney and his present or any future wife, and his children or any of them, or otherwise for their or any of their use and benefit, in such manner as the trustees or trustee for the time being should, in their or his uncontrolled discretion, think proper." (1) These observations are directly in point in the present case. If the obtaining of the benefit depends on the act of some human will no interest is conferred.

Vaughan Hawkins, in reply. In *Holmes* v. *Penney* (2), Wood, V.C., was speaking with reference to the particular circumstances of that case, and, as explained in Davidson's Precedents in Conveyancing, vol. iii., p. 98, 2nd Ed., he pointed out "the peculiar character of the trusts in giving the settlor a species of interest not capable of being attached by creditors." So here the settlor took "a species of interest." As explained by Knight-Bruce, V.C., in *Lord* v. *Bunn* (3) it was a "defeasible interest." It appears from the statement of the law in Sugden on Powers, c. 13, s. 1, clause 1, p. 622, 8th Ed., that the effect of such a power as this is to confer an interest.

STEPHEN, J. I am of opinion that our judgment ought to be for the Crown.

The question for decision turns on a very few words in s. 38 sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12). I think the meaning of those words is to be ascertained by looking at the other clauses in the Act. Section 27 grants certain duties in respect of probate and letters of administration, and s. 38 grants similar duties on accounts of certain kinds of property therein described.

(1) 3 K. & J. at p. 98. (2) 3 K. & J. 90
(5) 2 Y. & Coll. C. C. 98, at p. 103.

1887

ATTORNEY GENERAL v. HEYWOOD.

Stephen, J.

The scheme is to provide a remedy in cases which had been omitted by the former law, and accordingly the Act grants duties in respect of certain matters which had previously escaped. Sect. 38 provides that duty shall be paid on three kinds of property, viz.: (*a*) property taken as a donatio mortis causâ, because such property had formerly escaped liability to duty; (*b*) property voluntarily transferred by the person entitled to himself and another jointly; there again the person to whom such transfer is made obtains a benefit, which ought not to be exempt from duty, but which would have avoided duty under the previous law; next (*c*), which is this case, property passing under a voluntary settlement, whereby an interest for life is reserved, either expressly or by implication, to the settlor. The whole question here is whether by this settlement an interest for life is reserved, either expressly or by implication, to the settlor. The clause on which this question turns ought to be interpreted with reference to the scheme of the Act, and adopting that principle of construction I have come to the conclusion that the word "interest" in the statute ought to be interpreted so as to include that which was reserved to the settlor in the present case. By the terms of the settlement during the lifetime of the settlor the trustees were to apply the income of the settled property to his use or to that of certain other persons who were specified, but they had a discretion, which would have enabled them, if they had thought fit, to apply the whole for the benefit of such other persons to the exclusion of the settlor. I am clearly of opinion that what was reserved to the settlor was a life interest, for certain other persons would receive a benefit by his death. That is really enough for the decision of the present case, but much has been said in argument as to the meaning of the word "interest," and a case has been cited, *Holmes* v. *Penney* (1), to shew that the word has been defined in such a way as not to include the present case. It is impossible to rely on the use of a word in a vivâ voce judgment as affording a universal definition applicable to all states of circumstances, but if Wood, V.C., used the word "interest" in that case, he certainly did not intend to define an interest in every possible situation in which the word may occur.

(1) 3 K. & J. 90.

1887

ATTORNEY GENERAL v. HEYWOOD.

Stephen, J.

His judgment was not a decision upon the meaning of the word "interest," but turned on the meaning of a particular document, and on the question whether that document was void by virtue of the statute 13 Eliz. c. 5. That is not a judicial determination which can bind us to hold that the word "interest" in another Act of Parliament is to bear a different meaning from that which it would naturally bear in ordinary language. The same word may have different meanings in different connections, and in the present case, for the reasons which I have given, I think it includes that which was reserved to the settlor by this settlement. I do not understand the meaning of construing statutes in a strict, or a broad, or an equitable manner. The only proper method of construction which I know is to read the words through and ascertain what they mean.

I am of opinion that the Crown is entitled to the duty claimed.

WILLS, J. I am of the same opinion. The question is, whether under the settlement of June 15, 1878, any interest was reserved to Edmund Peel, the settlor, for if any interest was reserved to him it was clearly a life interest, because it terminated on his death. The word "interest" is capable of different meanings, according to the context in which it is used or the subject-matter to which it is applied. If the contention for the defendants is right nobody has any interest in the property settled, and yet the whole fund was to be held for the benefit of three classes of persons—the husband, the wife, and the children; and the sum of the benefits conferred on all these three classes taken together, being the sum of three nothings amounts to nothing, whereas, on the other hand, it must necessarily comprehend the whole interest in the fund. This is simply a reductio ad absurdum. The application of the word "interest" is not confined to a vested or a necessarily contingent interest. The Act was meant to cast a wider net than such a construction would imply. The settlor here could only be deprived of the benefit he would otherwise get under the settlement by the exercise of the power of depriving him of such benefit which was vested in the trustees, and unless the trustees so deprived him he would necessarily get a benefit.

In certain events, also, if a portion of the fund were unappro-

1887

ATTORNEY GENERAL v. HEYWOOD.

WILLS, J.

priated, the decisions shew that the Court might make a division among the members of the class for whose benefit the property was held, of which class the settlor was one, so that in that case he would get a benefit, and this, I think, is an interest. We were pressed with the expression of Wood, V.C., in *Holmes* v. *Penney* (1), that the settlor took no interest; but the words which he there used were "actual interest," thus expressing by the use of the adjective a certain amount of qualification. It is necessary to see in what connection those words occur, and what the subject-matter is with reference to which they were used. The suit was one to set aside a deed, on the ground that it was void under 13 Eliz. c. 5, and a great part of the judgment is an elaborate discussion to shew that the construction of the deed was not such as to make it a voluntary conveyance to which the statute applied, and that on the facts there was not evidence to shew that it was fraudulent. Among other facts the Vice-Chancellor says it is necessary to look at the benefit which the settlor took under the deed, and expresses an opinion that it was not an actual interest, because to bring it into fruition required an act on the part of the trustee. That is a very different thing from saying that in no sense did he take any interest under the deed.

Mr. Vaughan Hawkins has pointed out that in the case of *Lord* v. *Bunn* (2), under a somewhat similar deed, it was held that there was a defeasible interest, which could pass to the assignee in bankruptcy. He also cited Davidson's Precedents in Conveyancing, vol. iii., p. 98, where it is stated that in *Holmes* v. *Penney* (3) Wood, V.C., pointed out the peculiar character of the trusts giving the settlor a *species of interest*. I am of opinion that the settlement now before us gives the settlor a species of interest. The Act of Parliament was meant to meet cases in which an interest of some sort was conferred and which were not already provided for, and I think the language used is sufficiently comprehensive to include the present case.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for the defendants: *Gasquet & Metcalfe.*

(1) 3 K. & J. at p. 98. (2) 2 Y. & Coll. C. C. 98. (3) 3 K. & J. 90.

P. B. H.

[IN THE COURT OF APPEAL.]

1887
June 23.

LISHMAN *v.* CHRISTIE & CO.

Ship—Charterparty—Bill of Lading conclusive Evidence of Quantity shipped—Estoppel—Authority of Captain.

The defendants chartered the plaintiff's ship for the carriage of a cargo of timber from Memel. The charterparty provided that the ship should there load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchants' risk and expense, and that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. There was a custom at Memel, which, however, did not apply to charterparties in the form of the above-mentioned charterparty, that the captain should take delivery of the timber to be shipped at timber ponds up the river at some distance from the ship, the timber being then rafted down by fishermen to the ship, but being at the shipowner's risk during the process. The captain of the plaintiff's ship, on her arrival at Memel, not being aware of the provisions of the charterparty, allowed the mate to give receipts for the cargo at the timber ponds. Part of the timber included in such receipts was lost during the process of rafting the timber down to the ship, owing to the force of the current. The captain, having become aware of such loss and of the provisions of the charterparty, stated to the agent at Memel of the shippers, who had sold the timber to the defendants, that he did not see his way to signing clean bills of lading for the full quantity mentioned in the mate's receipts, a portion of the timber having been lost; but, on being told by such agent and a clerk of the ship's brokers that he was bound to sign clean bills of lading for the full quantity, he did so. The bills of lading stated that such quantity was shipped in good order and well conditioned to be delivered on payment of freight and all other conditions as per charterparty. In an action for balance of chartered freight the defendants counter-claimed in respect of short delivery of cargo:—

Held, that the bills of lading estopped the plaintiff from denying that the full amount of cargo stated therein was shipped.

APPEAL from the judgment of Cave, J. The action was by shipowner against charterers for 44*l.* 18*s.* balance of freight due under the charterparty. The defendants counter-claimed the same amount as damages for short delivery of cargo.

The facts proved at the trial were as follows: The defendants had chartered the plaintiff's ship for the carriage of a cargo of timber, which they had purchased from Messrs. Rucker & Co., of Riga, from Memel to Grangemouth. The charterparty, which was expressed to be made between the plaintiff's agents and the

1887

LISHMAN v. CHRISTIE.

defendants, provided, among other things, that the ship should load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchants' risk and expense, and that the bills of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. It was also provided that the ship should be addressed to the freighters' agent at port of loading. Evidence was given to the effect that there was a custom of the port of Memel by which the captains of ships took delivery of timber to be shipped at timber ponds up the river a mile or a mile and a half away from where the ships lay, the timber being then rafted down to the ship either by the crew, or, if they could not be spared, by fishermen, half of the expense of the rafting down in that case being borne by the ship, and half by the shipper, but the timber being at the shipowner's risk during the process. The jury found that there was such a custom at the port, but that it did not apply to charterparties in the form adopted in the present case. When the plaintiff's ship arrived at Memel, the captain, not having seen the charterparty, was informed by a clerk of the ship's brokers that he was bound to take delivery of the cargo at the ponds. Accordingly the mate went up to the ponds, and, having inspected the timber which was to be shipped, gave receipts there for a certain quantity. The timber was then rafted down to the ship by fishermen. The defendants had appointed no agents at Memel other than Fowler & Co., who were the agents of Messrs. Rucker & Co. at that port, from whom the cargo was received. The captain afterwards, having received a copy of the charterparty, went to the office of Fowler & Co., and pointed out that the cargo was by the terms of the charterparty to be brought to and taken from alongside the ship at merchant's risk and expense; but he was told by Mr. Fowler that it was the custom of the port to take delivery at the timber ponds. It appeared that on the way from the timber ponds to the ship a certain quantity of the timber was lost, some of the rafts having been broken up by the force of the current in the river. The captain, on becoming aware that some of the timber was lost, made a protest before a notary public in respect of such loss.

Upon bills of lading being subsequently presented to the captain by Fowler & Co. at their office in Memel, in which the quantity of timber stated to be shipped was the same as that mentioned in the mate's receipts, the captain stated to Mr. Fowler that he did not see his way to sign clean bills of lading, as there was a lot of cargo lost. Mr. Fowler, however, insisted on his doing so, and he was told by the clerk to the ship's brokers, who was present, that he ought by custom to sign clean bills of lading for the quantity stated in the mate's receipts, as he had noted protest against the loss of cargo. He thereupon signed the bills of lading as presented. The bills of lading stated that 9800 square red wood blocks and 850 half sleepers had been shipped by Fowler & Co. in good order and well conditioned, to be delivered at Grangemouth (certain perils excepted) unto order or to assigns, they paying freight for the said goods, and all other conditions as per charterparty. It appeared that all the timber actually shipped had been delivered.

The learned judge gave judgment for the defendants on the counter-claim, holding that the bill of lading was by the terms of the charterparty conclusive as to the quantity of timber shipped.

Gainsford Bruce, Q.C., and *J. Lawson Walton*, for the plaintiff. The provision of the charterparty, which makes the statement of quantity in the bill of lading conclusive against the shipowners, does not apply to the present case. Such a provision is intended to apply to a case where a bill of lading is signed with regard to goods believed to be shipped on board, the object being in such a case to prevent all subsequent dispute as to the quantity of goods shipped. It was intended to exclude all subsequent suggestion of mistake as to quantity in such a case. The provision never could have been meant to apply to a case like this, where the captain before signing knew and gave distinct notice to the shippers' agents that the goods were not all on board. The charterparty provides that the ship is to load a full cargo from the affreighter's agents; and the defendants appointed no other agents than Fowler & Co.; consequently, for this purpose Fowler & Co. were the agents of the charterers, and it is as if notice had been given to themselves. It cannot be that, where a captain

1887

LISHMAN v. CHRISTIE.

is induced in a foreign port to sign a bill of lading for goods not on board, all parties knowing that they are not on board, the shipowners are to be estopped by a provision of this sort from saying that the goods were not shipped. There can be no estoppel with regard to facts known to both parties. The captain has no authority to sign bills of lading for goods which, to his knowledge and to the knowledge of the shippers, were not in fact shipped. The meaning of the provision is that, if the bill of lading is signed on a proper occasion, i.e., with regard to cargo taken over the side, then the shipowner cannot dispute the quantum. But here it was signed with regard to goods for which the mate gave receipts, not at the ship's side but a mile or more away, and which were admittedly never shipped, having been lost before the signing of the bill of lading at a time when according to the charterparty they were not at the shipowner's risk.

[LORD ESHER, M.R. There is nothing to shew that the charterers knew that the amount stated in the bill of lading was not shipped.]

Secondly, the provision is that the bill of lading shall be conclusive evidence that the goods were received as therein stated, not that they were shipped on board the ship. The bill of lading may be conclusive evidence that the mate received the amount of timber stated at the timber ponds, but not that it was all put on board. The shipowner is by the terms of the charter not to be responsible for loss before the timber is brought to the ship. Hawkins, J., held in *Pyman* v. *Burt* (1), a case the circumstances of which were very like those of the present case, that in such a clause as this "received" was not equivalent to "shipped."

Thirdly, if this clause of the charterparty has the meaning contended for by the defendants, it cannot be reconciled with the previous provision that the goods are not to be at the shipowner's risk till brought to the ship. This provision shews that the bill of lading contemplated by the charterparty, and which was to be conclusive against the shipowners, was a bill of lading signed with respect to goods which had been brought to the ship. Here the goods never reached the ship.

(1) 1 Cababé & Ellis, 207.

[They also cited *Berkley* v. *Watling* (1); *Thorman* v. *Burt* (2); *Valieri* v. *Boyland* (3); *Grant* v. *Norway*. (4)]

Waddy, Q.C., and *C. C. Scott*, for the defendants, were not called upon.

LORD ESHER, M.R. In this case the charterers counter-claim in respect of short delivery of cargo, and they rest their case upon the charterparty and the bill of lading, which states that 9800 square red wood blocks and 850 half sleepers had been shipped in good order and condition to be delivered on payment of freight and all other conditions as per charterparty, thereby incorporating the terms of the charterparty. Inasmuch as less than that quantity has been delivered to the charterers, primâ facie there has been a short delivery of cargo. The shipowner thereupon seeks to prove that a smaller quantity than that mentioned in the bill of lading was all that was really shipped, and, if he is entitled to do so, no doubt it was proved as a fact that such was the case. The circumstances under which that happened were these. It appears that there is a custom at Memel under some charterparties that the timber to be shipped is taken possession of by the captain of the ship at the timber ponds, and the captain is responsible in respect of the bringing of the timber down from the timber ponds to the ship. I think the learned judge only admitted the evidence of this custom by way of precaution, so as to avoid any risk of a new trial, for I think the evidence was really inadmissible. It appears to me that the alleged custom was inconsistent with a clause in the charterparty, which was incorporated by the bill of lading, and which was inserted, I have no doubt, for the very purpose of excluding this custom, viz., the clause which provides that the cargo is to be brought to and taken from alongside the ship at merchant's risk. In the event, however, the jury found that the custom did not apply to charterparties in this form. Therefore this case must be dealt with on the footing that the custom did not apply. That being so, how does the matter stand? A bill of lading was signed by the captain stating that a certain quantity of timber was "shipped,"

(1) 7 A. & E. 29.
(2) 54 L. T. 349.
(3) Law Rep. 1 C. P. 382.
(4) 10 C. B. 665.

1887

LISHMAN v. CHRISTIE.

Lord Esher, M.R.

the meaning of which must be that it was delivered to the ship and put on board. If there had been no special provision to the contrary, that statement in the bill of lading would have been as against the shipowner only primâ facie and not conclusive evidence of the amount actually shipped, and he might have proved that a less quantity of timber was shipped. In other words the bill of lading, though primâ facie evidence against him, would not have been an estoppel. It is common knowledge among mercantile men engaged in the timber trade and those who have to deal with such cases as this, that constant disputes arise in respect of these timber cargoes as to the exact quantity put on board. The timber is sometimes floated to the ship's side, and sometimes brought in barges, but in one case there is risk of loss of timber from the rafts, and in the other of disputes as to the quantity put into and taken out of the barges. The bill of lading is signed in the belief that the right quantity has been delivered, and perhaps without very careful examination of the quantities, and very often a dispute afterwards arises. But the consignee or assignee of the bill of lading at the port of discharge has to pay for the timber against the bill of lading; and consequently he will have paid for the quantity stated therein, and then the shipowner turns round and says that less was delivered to him. It is to meet the difficulty in which consignees find themselves in such cases and to enable the bills of lading to be negotiated as representing the goods mentioned therein that such a clause as this bill of lading contains is inserted.

The provision is that the bill of lading is to be conclusive evidence of the quantity of cargo received as stated therein. How is any quantity stated to have been received by a bill of lading? By the word "shipped" of course. What can be the meaning of such a provision but to get rid of the liberty of the shipowners to shew that the quantity stated to have been shipped was not really put on board and to make the bill of lading an estoppel? The provision is a good business provision for the purpose of avoiding disputes as to quantity shipped where there is no dishonesty on either side. Of course, if there were fraud, such a provision would not take effect, for fraud overrides all such provisions. In the absence of fraud such a provision is meant to

1887

LISHMAN v. CHRISTIE.

Lord Esher, M.R.

cover all bonâ fide mistakes. It cannot be pretended here that there was any want of bona fides on the part of the charterers or the shippers' agents. It was urged that there was no mistake, because the captain knew and the shippers' agents knew that the full quantity of timber had not been put on board the ship. But the very object of this provision is to get rid of disputes as to what happened between distant agents such as these, or the clerks of such agents. There is no ground here for any suggestion that the charterers knew or must be taken to have known that the whole quantity was not shipped. The explanation of this transaction seems to be that it was a blunder on the part of the shippers' agents and the shipbroker's clerk in thinking that the custom applied to this charterparty, and consequently that the captain was bound to sign bills of lading for the quantity delivered at the ponds: but a blunder is not fraud, and there was nothing in the nature of fraud here. The clause was inserted for the purpose of preventing all disputes as to blunders with regard to the quantity stated in the bill of lading. With regard to the case of *Pyman* v. *Burt* (1), if that decision did decide anything contrary to what we are now deciding, all I can say is that I do not agree with it; but I do not think it is necessary to say whether we agree with that decision or not, because the circumstances of that case do not seem to be the same as those of the present case. For these reasons I think the appeal should be dismissed.

LINDLEY, L.J. The question in this case seems to me to turn entirely on the effect of the clause in the charterparty which provides that the bill of lading shall be conclusive evidence against the owners of the quantity of cargo received as stated therein. The reasons for the insertion of such a clause are tolerably obvious. The shipowner in the present case desires to do exactly what he has agreed not to do, viz., to shew that the ship did not receive so large a quantity as by the bill of lading it is stated to have received. I cannot see on what principle in the face of that provision he can claim to do so. If there had been any fraud the question would have been different, but there can be no

(1) 1 Cababé & Ellis, 207.

1887

LISHMAN v. CHRISTIE.

suggestion of fraud here. The shipowner has agreed to be bound by the statement in the bill of lading, and by that he must stand or fall. The whole object of such a provision as this is to prevent such a dispute as has here arisen. For these reasons I agree that the appeal should be dismissed.

LOPES, L.J. I agree. It seems to have been proved that all the cargo mentioned in the bill of lading was not shipped, some portion of it having been lost between the timber ponds and the port of loading. A bill of lading is no doubt generally speaking only primâ facie and not conclusive evidence as against the shipowners. But in the present case reliance is placed on the clause in the charterparty by which it is agreed that the bill of lading shall be conclusive evidence of the quantity received as therein stated. The object of that clause is, in my opinion, to prevent the very kind of dispute that has here arisen, and to make the statement in the bill of lading an absolute estoppel as against the shipowner.

Appeal dismissed.

Solicitors for plaintiffs: *Coote & Ball, for H. A. Adamson.*
Solicitor for defendants: *William Webb.*

E. L.

Applied. OLIVER *v.* DAVIS. [1949] 2 All E.R. 353.

Applied. OLIVER *v.* DAVIS. [1949] 2 K. B. 727

[IN THE COURT OF APPEAL.]

1887
July 2, 12.

CREARS *v.* HUNTER.

Contract—Suretyship and Guarantee—Consideration—Forbearance—Promissory Note.

For the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly at the rate of 5 per cent. per annum until the amount was paid. The plaintiff having forborne to sue for several years:—

Held, that, the plaintiff having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing.

APPEAL from the order of the Queen's Bench Division (Day and Wills, JJ.) setting aside the verdict and judgment for the plaintiff at the trial.

The facts in substance appeared to be as follows:—

The action was on a promissory note, the defence being that there was no consideration for the making of the note by the defendant.

The defendant's father (1), since deceased, had, before the defendant came of age, borrowed a sum of 200*l.* from the plaintiff, promising that his son, the defendant, when of age, would become surety for the debt. In 1877, the defendant being then of age, the plaintiff brought a promissory note stamp to the defendant's father's house, where the defendant then was, and the promissory note now sued upon was then drawn up and signed by the defendant's father and the defendant. By such note they jointly and severally promised to pay to the plaintiff or order "the sum of 200*l.*, being money lent, with interest on the same from Martinmas last past half-yearly at the rate of 5 per cent. per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest

(1) The executor of the father was joined as a defendant in the action, but had put in no defence; and for convenience sake the son is referred to throughout the report as if he had been the sole defendant.

1887

CREARS v. HUNTER.

had been paid upon the note. It appeared that on several occasions such interest was paid in the defendant's presence, and the receipts for such payments of interest were made out to the defendant's father and the defendant jointly. The principal being still due, the plaintiff brought his action on the note against the defendant Hunter and his father's executor.

The learned judge at the trial, A. L. Smith, J., appeared, in substance, to have told the jury that, if the note was signed by the defendant in order that the plaintiff might give time to his father, and the plaintiff did give time, there would be a good consideration for the making of the note by the defendant, and he left it to the jury to say whether there was such consideration.

The jury found for the plaintiff.

The Divisional Court set aside the verdict on the ground that there was no evidence of consideration, and entered judgment for the defendant.

French, Q.C., and *Mattinson*, for the plaintiff. There was evidence of a sufficient consideration to support the defendant's liability on the note. The understanding between the parties obviously was that, if the plaintiff would forbear from suing the defendant's father, the defendant would become responsible for the ultimate payment of the principal and for interest half-yearly at the rate of 5 per cent. per annum in the meantime. The plaintiff has actually forborne to sue for many years, no doubt thinking himself secured by the defendant's liability, and interest has been paid meantime on the note. It would be most unjust and misleading to a creditor under such circumstances if a surety could turn round and say there was no request for forbearance by him and no consideration for his liability. Actual forbearance from suing by the plaintiff at the request of the defendant would be a good consideration for the making of the note by the defendant although there was no promise to forbear: *Oldershaw* v. *King* (1); *Miles* v. *New Zealand Alford Estate Co.* (2)

[They also cited *Currie* v. *Misa* (3) and *Stott* v. *Fairlamb*. (4)]

(1) 2 H. & N. 399, 517.
(2) 32 Ch. D. 266, at pp. 289, 291.
(3) Law Rep. 10 Ex. 153.
(4) 52 L. J. (Q. B. D.) 420.

1887

CREARS v. HUNTER.

Gully, Q.C., and *Henry*, for the defendant. There was no consideration for the giving of the note by the defendant. The pre-existing debt of the father, in the absence of any promise to forbear, could not be a consideration for a guarantee of such debt by the defendant. The fact that the transaction takes the form of a promissory note makes no difference. The pre-existing debt was, according to *Currie* v. *Misa* (1), a good consideration for the making of the note by the debtor, but not for its signature by a third party. The father was liable upon the note immediately it was signed, if the plaintiff had thought fit to sue on it. The only result of the transaction, so far as the father was concerned, was to give the plaintiff an additional remedy against the father upon the note. A simple expectation of forbearance, even though realised, would not be sufficient consideration: *Miles* v. *New Zealand Alford Estate Co.* (2) This case is governed by *Crofts* v. *Beale.* (3) Assuming that actual forbearance at the request of the defendant would be a sufficient consideration, although there was no contract to forbear, the consideration being an executed one, in order that it should support the promise, there must have been an express request. On the facts proved in this case there was certainly no express request by the defendant that the plaintiff should forbear to sue his father; and it is contended that there was no evidence from which the jury were entitled to infer that the plaintiff forbore to sue at the defendant's request, the evidence shewing that the note was given merely as a collateral security for the father's debt.

French, Q.C., in reply. The only possible explanation of the defendant's signing the note was that he might procure time for his father. There is no reason why the request for forbearance should be express: a request necessarily arising by implication from the circumstances would be sufficient.

LORD ESHER, M.R. In this case the defendant's father had borrowed money of the plaintiff, and was actually liable to pay the amount so borrowed. The plaintiff purchased a promissory note stamp and went with it to the house of the defendant's

(1) Law Rep. 10 Ex. 153. (2) 32 Ch. D. 266, at p. 285.
(3) 11 C. B. 172.

1887

CREARS v. HUNTER.

Lord Esher, M.R.

father, and there found the defendant's father and the defendant, who was at that time under no obligation whatever to the plaintiff. A promissory note was drawn up, which does not, it is true, on the face of it provide for any delay in payment of the amount due by the father, because the father's liability on the note arose immediately after it was signed, if the plaintiff had chosen to sue on it. The note does nevertheless indicate on the face of it that, though there was no binding agreement to forbear, the parties did contemplate that the note might not be sued on for some time, because provision is made for the payment of interest half-yearly by the son jointly with the father. It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note? I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear on the other hand that a binding promise to forbear would be a good consideration for a guarantee. The question is whether, if the guarantor requests the creditor to forbear from suing and the creditor on such request, although he does not at the time bind himself to forbear, does in fact afterwards forbear to sue, there is a good consideration for the guarantee. It seems to me that it was laid down in *Oldershaw* v. *King* (1) that there would in such a case be a good consideration, and I do not think that any of the cases cited to us is really to the contrary. Erle, J., there said: "Looking at the whole letter and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advances should be made and time given by the creditor before he would press for payment of the existing debt. Though the contract did not bind the creditor to make further advances or to give time, unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument

(1) 2 H. & N. 399, 517.

was written became an absolute and binding contract." It clearly follows from what he there says that, if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt. It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to entitle the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible. I am of opinion that there was evidence to go to the jury that what the parties really understood in their minds was that, if the plaintiff would give the defendant's father time to turn round, the defendant would guarantee the payment of the principal in the end and in the meantime interest at the rate of 5 per cent. per annum half-yearly. I not only think that there was evidence of such an understanding, but I entirely agree with the inference drawn by the jury. I cannot see any other reasonable explanation of the transaction than that the understanding was as I have said. For these reasons I think that the verdict and judgment at the trial were right, and that the decision of the Divisional Court must be reversed.

LINDLEY, L.J. I am of the same opinion. In this case the plaintiff obtained a verdict in an action on a promissory note, the question left to the jury being whether there was any consideration for the defendant's giving the note. The Divisional Court have set aside the verdict and entered judgment for the defendant on the ground that there was no evidence of any consideration. We therefore have to consider whether there was any evidence of a good consideration for the signature of the note by the defendant. Looking at the document and the history of the transaction, I cannot invent any rational theory by which to account for the defendant's giving the note except that it was for

1887

CREARS v. HUNTER.

Lindley, L.J.

the purpose of benefiting his father by procuring for him time to pay the debt. To say otherwise appears to me inconsistent with human nature and the whole character of the transaction. It may be that there is no evidence that the defendant actually said that he would be liable, if the plaintiff would give his father time. But, except on the theory that such was the understanding between the parties, the defendant's conduct is inexplicable. I cannot think that there was no evidence for the jury that there was forbearance by the plaintiff at the request of the defendant. On the contrary, the evidence to the effect that there was seems to me overwhelming. Then the question arises whether that would constitute a sufficient consideration. Upon looking into the authorities it seems to me to be the result of other cases besides *Oldershaw* v. *King* (1) and *Mills* v. *New Zealand Alford Estate Company* (2), that it is not essential that the plaintiff should have agreed to forbear: it is quite sufficient if he did forbear at the request of the defendant. It is argued that in thus deciding we contravene the decision in the case of *Crofts* v. *Beale*. (3) But I do not so read that case. There the question was left to the jury whether there was consideration or not, the judge having told them that, if the note was given to prevent legal proceedings against the principal debtor, there was sufficient consideration for it. The jury found for the defendant, i.e. that there had been no request and no consideration. In this case the jury found that there was consideration.

LOPES, L.J. In this case the question is whether there was evidence of a consideration for the making of this note by the defendant. The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration. Taking the latter of these two alternatives, it is undisputed that there was actual forbearance from suing in this case. That by itself would not be sufficient; such forbearance must have been at the request, express or implied, of the defendant. There is no evidence here of any express request. It seems, however,

(1) 2 H. & N. 517. (2) 32 Ch. D. 266.
(3) 11 C. B. 172.

clear that there is evidence of an implied request, and I think the jury were justified in finding that there was such a request. Unless it were to procure forbearance, it is inconceivable why the defendant should have signed the note at all. The case is strengthened when it is borne in mind that the note provides for the payment of interest half-yearly by the father and son jointly, thus clearly indicating to my mind that forbearance was contemplated at the request of the son. For these reasons I think the judgment of the Court below should be reversed.

Appeal allowed.

Solicitors for plaintiff: *Speechly, Mumford, & Landon, for Atkinson & Bennett.*

Solicitors for defendant: *Helder & Roberts, for E. Atter.*

E. L.

[IN THE COURT OF APPEAL.]

July 11

ROE *v.* THE MUTUAL LOAN FUND, LIMITED.

Bankruptcy—Statement of Affairs—Estoppel.

The plaintiff gave a bill of sale on his furniture to the defendants to secure an advance. Before the payment of the first instalment due under the bill of sale he filed a petition in bankruptcy, and in his statement of affairs returned the defendants as secured creditors. The defendants seized and sold the furniture, and the proceeds being insufficient to pay their debt they proved for the residue. A composition of 2*s.* 6*d.* in the pound was proposed, and on the report of the official receiver was sanctioned by the Court and paid to the creditors, including the defendants. The plaintiff subsequently brought an action for the wrongful seizure of his goods, alleging that the bill of sale was invalid:—

Held, reversing the judgment of Pollock, B., that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in this action.

APPEAL from a judgment of Pollock, B., given on further consideration.

The action was brought for a trespass said to have been committed by the defendants in seizing furniture belonging to the plaintiff. The furniture was comprised in a bill of sale given by the plaintiff to the defendants to secure a loan which was to be

1887

ROE v. MUTUAL LOAN FUND.

repaid by instalments: a promissory note was also given as collateral security. The plaintiff made default in payment of the first instalment, and subsequently filed a petition in bankruptcy and a statement of his affairs, in which the defendants were inserted as secured creditors for the amount of the promissory note. The plaintiff's landlord put in a distress for rent, and the next day the defendants entered under the bill of sale and seized the furniture, which was sold, and the debt due to the landlord paid out of the proceeds. The remainder of the proceeds of the sale, which was considerably less than the amount due to the defendants, was retained by them, and they proved for the balance of their debt. A composition of 2*s.* 6*d.* in the pound was proposed, and, after a report had been made by the official receiver, was sanctioned by the Court. A cheque for the amount of the composition on the balance due to the defendants was sent to them by the plaintiff's solicitors in a letter which stated that the payment was made without prejudice to any claim which the plaintiff might make in regard to the seizure and sale of the furniture.

In the action the defendants counter-claimed for the balance of the debt due to them. The learned judge decided that the bill of sale was void, and that the plaintiff had a cause of action for the seizure of the furniture, and was not estopped from recovering, and he gave a verdict and judgment for the plaintiff for 50*l.* on the claim, and a verdict for the plaintiff on the counter-claim.

The defendants appealed.

Murphy, Q.C., and *Nasmith*, in support of the appeal. The plaintiff has elected to treat the bill of sale as valid, and on that footing has been released from his debts on payment of the composition. The creditors, including the defendants, cannot now object to the composition, and cannot recover their original debts. Their position consequently has been altered by the plaintiff's representations, and he cannot now be heard to say that they were incorrect.

[They cited *Smith* v. *Baker* (1) and *Willoughby* v. *Backhouse*. (2)]

(1) Law Rep. 8 C. P. 350. (2) 2 B. & C. 821.

R. V. Williams, and *James Wilson*, for the plaintiff. There is no evidence that the plaintiff induced the defendants to alter their position. The defendants have not consented to anything in consequence of the plaintiff's statements. They may be bound by the composition, but that is by reason of the sanction of the Court given after the report of the official receiver. Merely entering the defendants as secured creditors is not exercising any option to treat the bill of sale as valid, and it cannot be that a bankrupt is bound by every erroneous entry in his statement of affairs.

Murphy, Q.C., was not called on to reply.

LORD ESHER, M.R. In this case the plaintiff is suing for damages for trespass by the wrongful seizure and sale of his goods, and the question is whether the plaintiff can, under the circumstances, maintain the action. The plaintiff gave to the defendants a bill of sale to secure an advance of money. At a later period he presented his petition in bankruptcy, and in the statement of his affairs he put down the defendants as creditors secured by the bill of sale. The defendants seized the goods and sold them, and after paying the landlord the amount for which he had distrained they kept the balance, and satisfied a part of their debt, and became, as to the residue, unsecured creditors. That being the state of things, the various steps in the bankruptcy proceedings went on, some of them the plaintiff took himself and of all he must have had notice. He had notice what the creditors were willing to take, and that the proposition made to them had been put before the Court of Bankruptcy to be confirmed, and that on the faith of his statement of his affairs it had been confirmed. He knew also that his solicitors had put a receipt before the defendants to sign, so that, from beginning to end, he knew that the creditors were acting on the faith of his statement, and that by that means he got a release from all his debts on payment of 2*s.* 6*d.* in the pound to all the creditors on their debts, and to the defendants on the balance due to them after taking credit for the proceeds of the sale. It is said that after this he can sue the defendants as if he had not been bankrupt at all, and can say that the bill of sale was invalid, and the

1887

ROE v. MUTUAL LOAN FUND.

Lord Esher, M.R.

seizure under it wrongful, and that he can recover damages for trespass.

What is the law to be applied to this state of things. In my opinion the second alternative put by the learned judges in *Smith* v. *Baker* (1) is as good a decision as the first. It is quite true that the proceedings in bankruptcy were equivalent to suing for money had and received, but the judgments state that that is not the only way in which the tortious sale might be affirmed, so that it could not thereafter be treated as tortious. Honyman, J., there says, that a man "cannot say at one time that the transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void, for the purpose of securing some further advantage." Is not that precisely the present case? The plaintiff first said the bill of sale was valid, and so he got, on paying 2*s.* 6*d.* in the pound, a release from all the debts of all his creditors. That is the advantage he got by treating the bill of sale as valid, and now he desires to treat it as invalid, to get a further advantage. But it is said that the plaintiff got the advantage not by his own acts but by the action of the official receiver, who reported on the case, and that the creditors acted on his report. I cannot accept that view of the case because there was nothing to prevent the plaintiff making a candid statement as to the security. I base my judgment on this, that the bankruptcy proceeded on the basis that the bill of sale was valid, and that this was with the knowledge and acquiescence and for the benefit of the plaintiff, who thereby affirmed that the bill of sale was valid, and cannot now be heard to say that it was invalid in order to obtain a further advantage. I cannot therefore agree with the judgment appealed from, and the appeal must be allowed.

LINDLEY, L.J. I am of the same opinion. Before this action the plaintiff treated the bill of sale as valid, and everything was done in the bankruptcy on that footing. The plaintiff got the benefit of inducing the creditors to accept a composition and to discharge him, and now he desires to turn round and treat the

(1) Law Rep. 8 C. P. 350.

whole thing as invalid. The plaintiff's position and that of the creditors, including the defendants, has been so changed that the plaintiff is estopped from saying that the representations on which the whole thing turned were incorrect. The clause in the letter which enclosed the receipt, to the effect that the receipt was to be without prejudice to the plaintiff's right, was an ineffectual protest, indicating the intention of the plaintiff but having no legal operation.

LOPES, L.J. I am of the same opinion. The whole conduct of the plaintiff shews that he treated the bill of sale as valid in order to obtain an advantage. Notwithstanding which, he now turns round and seeks to treat it as bad, and so to obtain a further advantage. The case is within the words which have been already quoted of Honyman, J., in *Smith* v. *Baker* (1). I am also of opinion that the doctrine of estoppel laid down in *Pickard* v. *Sears* (2) applies. Lord Denman there said, "The rule is clear that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That seems to me entirely applicable to the present case. The letter of the solicitors was relied on, but it cannot assist the plaintiff, because the words "without prejudice" are not consistent with the plaintiff's conduct.

I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *J. & C. Attenborough, for Olding & Olding, Brighton.*

Solicitor for defendant: *W. J. W. Beard.*

(1) Law Rep. 8 C. P. 350.

(2) 6 A. & E. at p. 474.

A. M.

1887
July 16.

[IN THE COURT OF APPEAL.]

LEA *v.* FACEY.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 5, 10, 12, 254, 341—*Improvement Commissioners—Urban Sanitary Authority—Notice of Action—Act "done under the provisions of this Act"—Penalty.*

The effect of the Public Health Act, 1875, which makes improvement commissioners under local Acts urban sanitary authorities, is to reconstitute them as new bodies under the Act, vesting in them as such new bodies the powers given by the local Acts as well as those given by the Public Health Act; and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local Acts are acting under the Public Health Act, 1875, and consequently are entitled in respect of such act to any protection or privilege given by that Act to members of local authorities acting under its provisions.

So *held*, by the Court of Appeal, affirming the judgment of Wills, J. (17 Q. B. D. 139).

A person who is in fact disqualified from being a member of a local authority but who acts in the bonâ fide belief that he is a member is entitled to notice of action under s. 264 of the Public Health Act, 1875.

ACTION to recover a penalty of 50*l.* alleged to have been incurred by the defendant under ss. 9 and 15 of the Commissioners Clauses Act, 1847, by acting as a member of the Board of Improvement Commissioners for Abergavenny, under certain local Acts, when disqualified from so acting by reason of his being concerned in a contract made by the commissioners under the authority of such Acts.

The defence, among other things, alleged that the defendant had not received a notice of action as required by s. 264 of the Public Health Act, 1875, and also that the plaintiff had not obtained a consent of the Attorney General to the action as required by the Public Health (Members and Officers) Act, 1885. The facts as they appeared at the trial before Wills, J., without a jury were, so far as material to this report, as follows:—

By certain local Acts with which the Commissioners Clauses Act, 1847, was incorporated a board of improvement commissioners was constituted for the Improvement Act district of Abergavenny, which board afterwards became by virtue of the Public Health Act the urban sanitary authority within such district.

The defendant was elected a member of the board and acted as such by voting for the imposition of an Improvement Act district rate. The rate was headed, "An assessment to a rate for general purposes upon the Improvement Act district of Abergavenny, in the county of Monmouth, made, &c., to pay charges and expenses incurred by the Abergavenny Improvement Commissioners for the three months ending on the 30th of September, 1885, by virtue of the Abergavenny Improvement Acts, 1854, 1860, and 1871, and the Towns Improvement Clauses Act, 1847, or one or more of the said Acts." The expenses to meet which the rate was made, as shewn by the estimate prepared previously to the making of it, were some of them expenses authorized to be incurred by the local Acts only, some of them expenses authorized by both the local Acts and the Public Health Act, 1875, and some of them expenses authorized by the Public Health Act, 1875, only.

It was alleged by the plaintiff that the defendant when so elected a commissioner was disqualified by reason of his being the lessee from the commissioners of certain premises, and that he had, therefore, incurred a penalty under the provisions of ss. 9 and 15 of the Commissioners Clauses Act, 1847. It was contended for the defendant that under the circumstances of the case there was no disqualification; but it is unnecessary to state the facts with regard to that point, as the decision proceeded on the assumption that the penalty had been incurred; and the question was, whether the restrictions imposed on actions against members of urban sanitary authorities by the Public Health Act, 1875, applied to acts done by a member of a board of improvement commissioners being an urban sanitary authority in the exercise of the powers of the local Acts. The defendant had not received any notice of action, nor had leave to bring the action been obtained from the Attorney General.

The case was tried before Wills, J., who gave judgment for the defendant: see 17 Q. B. D. 139.

The plaintiff appealed.

The plaintiff in person. The defendant did not act exclusively under the Public Health Act, 1875, as the rates he took part in making were in part authorized by the local Acts, and consequently he cannot claim to be entitled to the protection given by

1887

LEA v. FACEY.

the Public Health Act. The effect of the Public Health Act is not to reconstitute the commissioners as new bodies but to add to their jurisdiction. But even if the defendant purported to act under the Public Health Act he is not entitled to notice. The 264th section enacts that a writ or process shall not be sued out against or served on any local authority, or any member thereof, for anything done or intended to be done or omitted to be done under the provisions of the Act without notice. It appears from the evidence that the defendant had a contract with the board which disqualified him, and consequently he was never validly elected, and was never in fact a member so as to entitle him to the protection of the statute.

R. Cunningham Glen, for the defendant, was stopped.

LORD ESHER, M.R. In this case an action has been brought against the defendant to recover a penalty from him because he acted as improvement commissioner at a time when he had a contract with the board of which he was a member. The answer given is that, assuming the defendant was wrong, the plaintiff cannot recover in the action because he did not give the notice required by the 264th section of the Public Health Act, 1875. The question, therefore, is whether the case is within that section. It is not denied that the defendant was acting as member of the urban sanitary authority at Abergavenny, but it is said that he was not a member in point of law, and so was not entitled to notice as a member; and, secondly, that some part of what he did was done, not as member of the urban sanitary authority but as commissioner under the local Acts, and that in consequence no notice was necessary. As to the first point the argument is that the defendant having a contract with the board could not be validly elected a member of it. I think he could not, for the case is like that of a member validly elected who ceases to be one when he takes a contract with the board. But does that deprive him of the right to notice? If he acts as a member under a bonâ fide belief that he is a member I think he is entitled to notice. The case seems to me to come within the principle laid down in *Hughes* v. *Buckland*. (1) It is clear to my mind that the defendant

(1) 15 M. & W. 346.

believed he was a member of the board, and if it can be said that the acts in which he took part come within the authority that the board can exercise, then he thought that he was authorized to do those acts as a member of the board. Was, then, what he did a matter which was done under the Public Health Act or only under the Improvement Acts? The authority to do a part of that which the defendant did arises under the Public Health Act, and the authority to do the other part under the local Acts. Sect. 10 of the Public Health Act applies to such a case, for it enacts that where there is a local Act in force within the district of an urban authority conferring on commissioners, trustees, or other persons powers for purposes the same as or similar to those of this Act, all the powers of such commissioners are transferred to the urban authority. Now the powers under the local Acts were similar to those given by the Public Health Act, so that by force of s. 10 those powers are transferred to the urban authority. That this is the intention of the Act is further indicated by other sections, and especially the 12th, which deals with the vesting of property in local authorities. It seems to me, therefore, that what was done was done under the Public Health Act. The conclusion I come to, therefore, is that though the defendant was not legally a member of the board, he acted in the bonâ fide belief that he was, in matters within the authority of the board, and was entitled to notice under s. 264 of the Public Health Act.

LINDLEY, L.J. I have come to the same conclusion as that at which Wills, J., arrived, and I agree with him that the rate was made under the provisions of the Public Health Act, and none the less so because the effect of that Act was to clothe the newly constituted authority with the right of exercising the powers conferred upon it by the local Acts. It appears to me that that is the correct view of the section. If so, subject to one point that I will mention, the defendant is entitled to the protection of s. 264 of the Public Health Act, 1875, and to the procuring of the fiat of the Attorney General before action. But then it is said the defendant is not entitled to this, because he was not legally a member of the board. That argument is met by the case of

1887

LEA v. FACEY.

Hughes v. *Buckland.* (1) The defendant believed himself to be a member and was bonâ fide acting as such, and was therefore entitled to notice.

LOPES, L.J. I think the defendant was within the protection of s. 264 of the Public Health Act, 1875. I agree with the construction put upon that Act, having regard especially to ss. 10 and 12, under which the powers and property of a local authority under local Acts are absorbed by the urban authority constituted by the Public Health Act. A point was made that the defendant was not in fact a member of the board, because he was not qualified to be elected to it, and that, therefore, he was not within the purview of s. 264. But he acted in the bonâ fide belief that he was a member, and according to the authority of *Hughes* v. *Buckland* (1) that is sufficient to entitle him to the protection accorded by the statute.

Appeal dismissed.

Solicitor for plaintiff: *H. Thomas, for L. D. Browne, Abergavenny.*

Solicitors for defendant: *J. T. & G. F. Marshall, for Gabb & Walford, Abergavenny.*

(1) 15 M. & W. 346.

A. M.

BOURNE AND OTHERS *v.* THE NETHERSEAL COLLIERY COMPANY. 1887 *July* 13.

Mine—Wages—Payment by Weight of Mineral—Mode of determining Deductions—Illegality—Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.

By the Coal Mines Regulation Act, 1872, s. 17, persons employed in certain mines are to be paid according to the weight of mineral gotten, provided that agreements may be made as to certain deductions, "such deductions being determined by the banksman or weigher and check-weigher (if there be one)."

In the defendants' colliery the coal was weighed close to the pit's mouth, in presence of the weigher and check-weigher, and was then carried to a distance, and thrown on to a screen, and the weight of the slack which passed through the screen was ascertained by a person in the defendants' employ, who was not a weigher or check-weigher, and wages were paid according to the weight of the coal, after deducting the weight of such slack.

In an action by persons employed in getting the coal to recover the amount so deducted from their wages:—

Held, that the deductions, not having been determined as provided by the statute, were illegal, and the plaintiffs were entitled to recover.

APPEAL from the judgment of the judge of the County Court of Leicestershire at Ashby-de-la-Zouch.

The plaintiffs were employed in the defendants' colliery.

The action was brought to recover the sum of 20*l.* 8*s.* for wages earned by the plaintiffs by getting coal for the defendants. The plaintiffs also claimed the same amount, as having been illegally and improperly deducted from their wages by the defendants, without the assent of their check-weigher at the colliery, and against the provisions of the Coal Mines Regulation Act, 1872 (1).

(1) 35 & 36 Vict. c. 76. By s. 17: "Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends on the amount of mineral gotten by them, such persons shall, unless the mine is exempted by a secretary of state, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly.

"Provided always, that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or

1887

BOURNE v. NETHERSEAL COLLIERY CO.

The plaintiffs were employed under the following agreement: "I, the undersigned, hereby agree to serve the Netherseal Colliery Company, Limited, proprietors of the Netherseal Colliery, near Burton-on-Trent, from this date, and to obey the general and special rules and regulations of such colliery, a copy of which I hereby acknowledge to have received. I also agree that the 'mineral contracted to be gotten' referred to in the Coal Mines Regulation Act, 1872, shall in all cases mean and include only such pieces of clean coal as cannot fairly be passed through an ordinary loading rake, the clear spaces between the prongs of which are two and a half inches wide. And I also agree to give or take fourteen days' notice to determine my service; and I, the undersigned, on behalf of the Netherseal Colliery Company, Limited, hereby agree to employ the above-named person upon these terms and conditions, subject to all stoppages which may arise from accidents, want of trucks, slackness of trade, or other causes beyond our control."

A strike having taken place a proposal was made by the men to return to work on certain terms, one of which was "that the average be taken at Billy Fairplay only." This proposal was not acted on, but the men returned to work, it being agreed that coal should be paid for at 16*d.* per ton, with a premium of 2*d.* per ton in certain cases. This agreement contained the following clause: "No slack whatever will be paid for except that sent out as

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his drawer, or by the person immediately employed by him, such deductions being determined by the banksman or weigher and check-weigher (if there be one), or in case of difference by a third party to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other.

* * * *

"If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, this section, he shall be guilty of an offence against this Act."

By s. 18: "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may at their own cost station a person (in this Act referred to as 'a check-weigher'), at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed."

heading slack; all other slack will be deducted from the different places in proportion to their loading."

The following facts with regard to the weighing and deductions appeared on the county court judge's notes.

The coal was put into tubs in the pit, and the tubs were then put on a tramway and carried to the pit's mouth, where they were hoisted to the surface, unhooked, and wheeled along rails to a weighing-machine three yards from the unhooking point. At the weighing-machine was an office occupied by the weigher and the check-weigher. The coal was then weighed, and the weights were taken down by the weigher and check-weigher. The coal was then moved on trucks along a tram line to a place where it was sorted into classes, and after it had been sorted the trucks were taken to a place forty yards distant from the office of the weigher and check-weigher, where the coal was shot down six feet on to a screen forming part of a machine called "Billy Fairplay," and a boy, who was only in the employ of the company, noted from a dial the weight of slack that had gone through the screen. At the end of the week the check-weigher handed to the men the weights, so as to guide them in the amount of wages to be received. When the men went to the cashier they received pay tickets, shewing the amount of weight on which they were entitled to wages, and their wages. The amount shewn on the pay tickets, which was the amount paid, was less than the amount of the weights given to the men by the check-weigher, the weight of the slack which had gone through the screen of "Billy Fairplay" being deducted. The company had advised the men to appoint another check-weigher to attend "Billy Fairplay," and offered to pay him themselves, an offer which the men did not accept.

The county court judge gave judgment for the defendants, and the plaintiffs appealed.

Alfred Young, for the plaintiffs. The process by which these deductions are determined is illegal, being contrary to the express terms of the statute, which provides that the deductions are to be determined by the weigher and check-weigher (if there be one). Here there was a check-weigher, but the deductions

1887

BOURNE v. NETHERSEAL COLLIERY CO.

were not determined by him, nor by the weigher. *Jones* v. *Llynvi Colliery Co.* (1), which was referred to in the county court, is not in point, because in that case the weighing took place in presence of the weigher and check-weigher.

MacClymont (*Hextall*, with him), for the defendants. There is nothing in the Act to shew that there need be a check-weigher. The weighing need not be done all at one point, and there is nothing to prevent there being two check-weighers at the different points. If the men had accepted the masters' offer they would have had a second check-weigher to represent their interests. They consented to the course adopted, and there is nothing illegal in it.

[He referred to *Hynd* v. *Spowart* (2); *Griffiths* v. *Earl of Dudley*. (3)]

Young, was not heard in reply.

STEPHEN, J. My view is that s. 17 of the Coal Mines Regulation Act, 1872, determines the present case. That section provides that persons employed in the mine shall "be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly." The case of *Jones* v. *Llynvi Colliery Co.* (4) shews that the mineral to be weighed may be the coal without the slack, if it is so agreed. The proviso in the section allows certain deductions, but enacts that those deductions shall be determined by the banksman or weigher and check-weigher (if there be one). Here the deductions were not determined in the manner pointed out by the Act, for they were determined neither by the banksman or weigher, nor by the check-weigher, but by the boy who managed the machine called "Billy Fairplay." It is said that it was agreed that this mode of calculating the deductions should be adopted, but I am of opinion that it was not competent to the parties to get out of the provisions of the Act of Parliament by means of such a contract. Our judgment, therefore, will be in favour of the plaintiffs for the amount claimed.

(1) Before Stephen and A. L. Smith, JJ., November, 1886, not reported.

(2) 22 Scottish Law Reporter, 702.

(3) 9 Q. B. D. 357.

(4) Not reported.

1887

BOURNE v. NETHERSEAL COLLIERY CO.

WILLS, J. I am of the same opinion. The plaintiffs' claim is for the amount of certain deductions which they allege to have been illegally made. They claim payment on the weight ascertained in the only way which the statute allows. There is a proviso in s. 17 that nothing in the Act shall preclude agreements for deductions "in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten." This proviso is satisfied by allowing contracts as to the making of such deductions, but it is not intended to go further and to provide that the deductions so agreed upon may be ascertained by some method different from that provided by the Act. If this had been the intention it would have been expressly stated. The words are, "such deductions being determined by the banksman or weigher, and check-weigher (if there be one)." In the present case there was a check-weigher, but the deductions were not determined by him. The Act was meant to prevent the adoption of methods of ascertaining deductions other than those provided, its policy being to stop the making of certain contracts which were found to engender constant distrust and suspicions of unfair dealing, and so to produce disastrous results to the industry of the country. The deductions here were not determined by the banksman either with or without the check-weigher, but by the boy who had charge of the machine called "Billy Fairplay." For these reasons I am of opinion that the plaintiffs are right in their contention, and that the only deductions which the defendants have any right to make are those which are ascertained in accordance with the 17th section of the statute.

Appeal allowed.

Solicitors for the plaintiffs: *Field, Roscoe & Co., for Deane & Hands, Loughborough.*

Solicitors for the defendants: *Morten, Cutler & Co., for Challinor & Co., Leek.*

P. B. H.

1887
July 8, 9, 23.

THE ROYAL MAIL STEAM PACKET COMPANY, LIMITED *v.* THE ENGLISH BANK OF RIO DE JANEIRO, LIMITED.

Ship—General Average—Stranding—Effect of Discharge of Part of the Cargo before the Commencement of Extraordinary Measures for getting off the Ship.

A steamer, carrying among other cargo a large amount of specie, ran aground and lay in a dangerous position. The specie was landed by the master soon after the vessel struck. After the landing of the specie the master jettisoned part of the cargo, and had recourse to other extraordinary measures for getting off the vessel. These measures succeeded, and she completed her voyage with the cargo remaining on board. The specie was conveyed to a neighbouring port, whence it was sent on in another vessel, but for the purposes of the case was to be treated as having arrived in the steamer :—

Held, that the losses and expenses incurred in getting the steamer off, and the expenses incurred in landing and conveying the specie, were not general average to which the owners of the specie were liable to contribute.

SPECIAL CASE, of which the following were the material facts :—

The plaintiff company are owners of the British steamship *Tagus*. The defendant company are bankers carrying on business in Rio de Janeiro and in London.

On June 22, 1886, the defendants delivered to the plaintiffs 25,000*l*. specie in boxes, to be carried on board the *Tagus* from Rio de Janeiro to Southampton, and there delivered to the defendants pursuant to the terms of a bill of lading. The bill of lading was in the ordinary form, and contained the usual exceptions. By one of its clauses the plaintiffs had power to "tranship or land" the goods shipped, and by another "average, if any" was "to be adjusted in England and according to the practice of English average adjusters."

On June 24, 1886, the *Tagus* set out from Rio de Janeiro for Southampton, with passengers, mails, specie, including that belonging to the defendants, of the value of 125,000*l*., and a general cargo.

On June 27, 1886, the *Tagus* ran aground on a coral reef off Arituba, on the island of Itaparica, about fifteen miles from Bahia. She remained aground till July 2, when she was got off and continued her voyage. In the meantime certain losses and

expenses were incurred to which the plaintiffs claimed a genera average contribution from the defendants in respect of their 25,000*l.* specie. Such losses and expenses were incurred under the following circumstances.

The reef on which the *Tagus* grounded was about 2½ miles from Itaparica, which is an island 15 miles long by 4 broad, and to a great extent uninhabited. Arituba, the nearest point to the stranded vessel, is a fishing village consisting of a few huts. It is connected by a poor road with Catu, a small town on the opposite side of the island, about 20 miles from Bahia, and at which a steamer from Bahia calls several times weekly.

The protest stated: "At 2.30 A.M. on June 27 the vessel took the ground. Immediately reversed engines full speed and took soundings all round the ship and found 16 feet on port side by bridge, 24 feet on starboard bow, 18 feet forward, and 3¼ fathoms on starboard quarter. At 3.30 ship not moving and a heavy swell and sea setting on, causing her to bump heavily. Stopped with 4 fathoms water under bow and 3½ fathoms under stern. The helm was then put hard to port and steamed full speed ahead, but ship not moving, and bumping so heavily as to render it unsafe to use the engines further. Accordingly stopped, and starboard anchor was let go. . . . At 4.30 the starboard aft cutter was washed away by the terrific seas which broke over the decks constantly."

The sea somewhat decreasing, the second mate was sent in a boat to Bahia for assistance. He saw the ship's agent, who at once engaged tugs and lighters to go to the assistance of the vessel, and also arranged with the governor of the district that an escort of soldiers should be sent to protect the specie. "At 8.30 the starboard cable parted, a strong breeze and heavy sea raging, and breakers dashing over both quarters and bows." The master determined to land the passengers at Itaparica, and the majority were landed there before nightfall on June 27.

On June 28 the ship continued to "bump heavily." The remaining passengers were landed with their effects, and all the specie, including that belonging to the defendants, was taken ashore in the ship's lifeboat, and placed in a hut engaged for that purpose in charge of the purser. A steamer, sent by the

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

agent, with his clerk on board, arrived from Bahia, but owing to the weather refused to come near the *Tagus*, and the clerk did not attempt to communicate with her.

On June 29, according to the protest, "tremendous rollers from the southward prevailing, the master deemed it expedient, as the only means of saving the vessel, to throw overboard the cargo and ballast. The whole of the day was accordingly employed in heaving the said articles overboard, ship bumping greatly from time to time."

On the evening of June 29 a tug engaged by the plaintiffs' agent at Bahia arrived, and on the morning of June 30 five more tugs engaged by him arrived, together with lighters. During June 30 and July 1 the crew and labourers employed from the shore continued throwing overboard ballast and cargo. The sea was too high to admit of discharging the latter into the lighters. Hawsers were received from the tugs, and towing was continued during a great part of the two days, the engines of the *Tagus* being put full speed astern, and the hawsers frequently parting. At 5.45 on July 2 the ship came off the ground.

On July 1 the military escort arrived from Bahia and took charge of the specie. On the 3rd it was placed in a bullock-waggon and conveyed by the escort to Catu, whence it was transferred to a steamer and taken to Bahia, where it was placed in the custom-house.

The *Tagus* after being got off proceeded under her own steam to Bahia, where she was examined by a diver, and proving to be little injured proceeded without repairs to Southampton with the part of her cargo which remained on board. The specie was forwarded to Southampton by agreement with the various shippers, in another vessel, the *Elbe*, but it was agreed that for the purpose of ascertaining whether any and what general average contribution was due from the defendants to the plaintiffs in respect of the 25,000*l.* specie shipped by the defendants, it should be treated as having been carried by the plaintiffs to Southampton in the *Tagus*.

The losses and expenses in respect of which the plaintiffs claimed from the defendants a general average contribution were the losses by and incidental to the jettison, the cost of the hire

of the tugs, lighters, and other salvage expenses, and the cost of landing, protecting, conveying, and warehousing the specie at Itaparica and Bahia.

The Court had power to draw such inferences of fact as a jury would have been entitled to draw.

Sir R. E. Webster, Q.C., A.G. (with him, *Sir C. Russell, Q.C.*, and *Raikes*), for the plaintiffs. The specie of the defendants is liable to general average contribution. The specie was landed at Itaparica, guarded while there, and sent on to and warehoused at Bahia as a part of a continuous salvage operation undertaken for the common preservation of ship, cargo, and freight, of which the jettison and the employment of tugs formed another part. Had the specie been kept on board, or placed in a ship's boat or a lighter during the jettison and towing, it would clearly have been liable to contribute. The fact that it was landed can make no difference. It was landed with a view to being again taken on board and conveyed to its destination. There was no real severance of the adventure. The true inference from the facts stated is that all the extraordinary measures taken from the landing of the specie on June 28 to July 3, when both ship and specie reached Bahia, had reference not to a single but to the common interest. The measures taken in regard to the specie, though they involved a degree of special care which it was the duty of the master to bestow because of its value, had really the effect of enabling him to use his best efforts to get the ship off. He would not have been justified in prosecuting a dangerous salvage operation while an article at once so valuable and so easily removed remained on board. But the specie, though landed, was still in danger. It could no longer perish with the ship or be jettisoned, but it was liable to be taken by force or stolen, as the employment of the military escort shews. Thus a common danger to the general adventure continued till the voyage was resumed at Bahia, and the specie must, like the rest of the cargo, contribute to the extraordinary losses and expenses incurred in consequence.

The case resembles *Moran* v. *Jones*. (1) It is true that *Moran*

(1) 7 E. & B. 523.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

v. *Jones* (1) has been doubted, and has been supposed to be inconsistent with *Job* v. *Langton* (2) and *Walthew* v. *Mavrojani*. (3) But the cases are consistent. In both the part of the cargo sought to be made contributory had been taken out before the efforts to get the ship off commenced, but in one case the Court drew the inference of fact that the removal was part of a general salvage operation, in the other that it was a special operation undertaken for the preservation of the goods themselves. In the present case the former inference will be drawn.

The captain, who is agent for all, ought not to have the power of exonerating part of the cargo from the liability to contribute. On the other hand, if a captain knew that gold ceased to be contributory on being transhipped or landed he might be tempted improperly to keep it on board and exposed to risk in order to preserve its liability.

[He cited *Walthew* v. *Mavrojani* (3); *Bevan* v. *Bank of United States*, in the Supreme Court of Pennsylvania (4); *Nelson* v. *Belmont*, in the Superior Court of New York. (5)]

Bigham, Q.C. (*J. Gorell Barnes* with him). The removal of the specie did not appreciably lighten the vessel or assist the salvage operations. The gold was placed in safety, as the passengers were landed, for its own protection, and not with a view to or as a part of the salvage operations. The jettison and towage were of consequence to the ship and the cargo remaining on board, but not to the gold, which was safe on shore, except in so far as they tended to enable the ship to continue her voyage. This consideration is, however, irrelevant as regards general average: *Walthew* v. *Mavrojani* (3); *Svendsen* v. *Wallace*. (6) The true criterion is given in *Kemp* v. *Halliday* (7), where Blackburn, J., cites as a "perfectly accurate statement of the law" the following passage from Arnould on Marine Insurance, 2nd ed. vol. 2, p. 931: "A stranded vessel is in most cases in danger of being lost unless speedy steps be taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float

(1) 7 E. & B. 523.
(2) 6 E. & B. 779.
(3) Law Rep. 5 Ex. 116.
(4) 4 Wharton, 300.
(5) 5 Duer. 310.
(6) 13 Q. B. D. 69.
(7) 6 B. & S. 723; 34 L. J. (Q.B.) 233.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

her by means of buoys, &c., with the cargo in her. The remuneration which the shipowner is obliged to pay for the services thus rendered gives a claim to general average contribution, provided such services shall appear to have been incurred for the joint benefit of ship and cargo, which will be the case if ship and cargo are both exposed to common danger, and both saved by the exertions employed for their rescue." Here the common danger to the ship and the gold ceased as soon as the gold was removed from the ship, and it was safe and exposed to no peril in common with the ship when the exertions for which contribution is sought began. In *Walthew* v. *Mavrojani* (1), in the Exchequer Chamber, the principle is thus applied by Bovill, C.J., to a case like the present: "Whereas to ground a claim for general average there must be a danger actual or impending, common to both ship and cargo, here the cargo was safe and the ship only in peril: it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made or extraordinary expense incurred to save both ship and cargo, or for the common benefit of both."

Had the captain left the gold on board to run the risks incident to that position and to the salvage operations, the shipowner would have been liable to an action: *Notara* v. *Henderson.* (2)

In *Svendsen* v. *Wallace* (3) Butt, M.R., expressed the opinion that *Moran* v. *Jones* (4) cannot be sustained. The American decisions are of no authority, as American law has adopted the criterion of the continuation of the voyage, which is repudiated by English law.

Sir R. E. Webster, Q.C., A.G., in reply.

Cur. adv. vult.

July 23. The following judgments were delivered:—

WILLS, J. In this case the owners of the *Tagus* claim contribution by way of general average from the owners of specie carried by her on a voyage from Rio to Southampton under the following circumstances.

The *Tagus* grounded off the island of Itaparica, about fifteen

(1) Law Rep. 5 Ex. 116, at p. 125.
(2) Law Rep. 7 Q. B. 225.
(3) 13 Q. B. D. 69.
(4) 7 E. & B. 523.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

WILLS, J.

miles from Bahia, at 2.30 A.M. on June 27, 1886. She grounded on a coral reef, on one part or another of which, with slight variations of position, she remained till the evening of July 2. The sea was running high, and very shortly after she struck seas broke over which continually swept the decks and washed away the cutter. She was exposed to the unbroken force of the Atlantic rollers, and I cannot doubt that she was from the first and remained to the last in a position which threatened the destruction alike of ship and cargo, and which made it necessary that extraordinary sacrifices should be made and extraordinary expenses incurred to save the ship and cargo. In the forenoon of the day on which she struck, June 27, the master began to land his passengers and their baggage, and completed this operation on the 28th. About 10 o'clock on the 28th he landed the specie, of which 25,000 sovereigns belonging to the defendants formed a part.

The vessel lay about 2½ miles from the shore, and very nearly opposite to a fishing village called Arituba, consisting of a few huts. The island is from 12 to 14 miles long, mostly uninhabited, but about 4 miles off is a small town called Catu, on the western coast of the island. A small steamer plies several times a week between Catu and Bahia, distant about 20 miles. The specie was landed at Arituba and placed there in a hut hired for the purpose, and remained there in charge of the purser and doctor, from June 28 to July 2, when the purser handed it over to a Brazilian custom-house officer, under the charge of whom, accompanied by the purser, it was on July 3 taken across the island to Catu and there put on board a small steamer sent from Bahia by the plaintiffs' agent. A file of soldiers had been sent from Bahia by the president of the province on July 1, and placed at the disposal of the captain, and they guarded the specie from their arrival till it left Catu, and escorted it on the steamer to Bahia, where it was handed over to the plaintiffs' agent, and by him forwarded to Southampton by the *Elbe*, under an agreement between the plaintiffs and defendants, by which they agreed to pay general average as if it had come by the *Tagus*.

The master of the *Tagus* finding her immovable sent away the second officer with the mail boat about 8 A.M. on June 27.

Her position on the reef had been ascertained at 3.30 A.M., when she had 4 fathoms of water under her bow and 3½ under her stern, so that she must have been resting on the reef somewhere between bow and stern, and there can be no doubt that she was in a position of great peril. The plaintiffs' agent at once proceeded to engage lighters and tugs at Bahia to proceed to the assistance of the *Tagus*, and I have no doubt from this fact that the master had sent him word that it would be necessary to lighten the vessel in order to get her off. The mail boat with the officer in charge returned to the ship about 8 P.M. of the 27th. The first steamer sent by the agent arrived near the *Tagus* in the forenoon of the 28th, but the weather appears to have been too heavy to admit of her rendering any assistance, or even to allow communication between the agent's clerk who was on board her and the stranded vessel, and about mid-day she steamed back to Bahia. In the night between the 28th and 29th very heavy rollers set in from the south, and about 5 A.M. the master came to the conclusion that the only means of saving the vessel was to jettison the cargo, and the crew worked at getting cargo overboard the whole of that day. A tug arrived in the evening of the 29th, and on June 30 and July 1 several other tugs followed. The work of jettisoning cargo and coals went on till the evening of July 2, the tugs hauling on to the ship and the ship's engines working at each high water. The hawsers parted repeatedly, and it was not till the evening of July 2 that the steamer floated. Lighters had been sent out to the ship to save if possible some of the cargo that had to be taken out, but the weather was too heavy to permit of their being used, except one, which carried some of the passengers' effects ashore. The steamer proceeded the next morning, July 3, under her own steam to Bahia, where she arrived a few hours before the small steamer with the specie. A portion only of the cargo had been jettisoned, and the *Tagus* was so far uninjured that she proceeded without repairs to Southampton with the remainder of her cargo on board, which she delivered in good order. She could have carried on the specie, but it was carried by the *Elbe* at the request of the defendants and under the agreement hereinbefore referred to.

The plaintiffs contend that the specie is liable to contribute by

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

WILLS, J.

way of general average to the loss by jettison and the expense of getting the ship afloat, and the cost of landing, guarding, transporting, warehousing, and reloading the specie. No attempt has been made on either side to draw a distinction between the claim in respect of jettison and that in respect of the cost of tugs and the like, and for the purposes of this case I treat these two heads of claim as standing on the same footing.

The case is in one important respect peculiar. There is no question as to circumstances having arisen which gave rise to a general average loss It is not suggested that cargo generally is exempt, nor is it denied that the goods remaining on board and the goods jettisoned, alike must bear their share of the common loss, but it is said that, so far as the specie is concerned, it was in a place of safety before any of the loss or expense was incurred, and that the expense of landing, guarding, transporting, warehousing and reloading the specie, are particular average chargeable on the specie alone and are not general average at all. The question is not, therefore, whether the circumstances are or are not such as to make cargo, as distinct from ship and freight, liable to general average, nor whether, granting that cargo is liable to general average, the liability extends to this or that head of damage or expenditure, but whether one particular parcel of the cargo is exempt from the general burden. It is true the question is raised whether the specie is liable by way of general average contribution to bear its share of the expenses incurred for landing and guarding it and for transporting it to Bahia, but this seems to me to come pretty much to the question whether the specie is or is not liable to contribute to general average. If it be so liable, these expenses can hardly be particular average. If it be not, they certainly cannot be general average.

The cases, therefore, which deal with the liability of the cargo as a whole differ so materially in their circumstances from the present case that they can hardly be said to govern it, and it is to the principles they lay down and illustrate rather than to actual precedent, of which there is a singular dearth, that we must look for the solution of the question.

I take it to be settled now that the circumstances which impose a liability in the nature of general average must be such as to

imperil the *safety* of ship and cargo and not merely such as to impede the successful prosecution of the particular voyage: *Svensden* v. *Wallace* (1); *Harrison* v. *Bank of Australasia.* (2) I take it also to be settled that if the cargo as a whole be landed and in safety the expenses of getting the ship afloat incurred thereafter are not general average: *Job* v. *Langton* (3), a case with which *Moran* v. *Jones* (4) has been supposed to conflict, but which does not seem to me, so far as principles are concerned, to be open to that observation. It is the decisions, if anything, which are at variance, not the principles upon which they are based. The Master of the Rolls has stated in *Svensden* v. *Wallace* (5) that the *decision* in *Moran* v. *Jones* (4) cannot be supported, and I refer to the case therefore only to shew that it has not been overlooked. Where the cargo as a whole is safely landed, the shipowner has his ship as she lies, either supposed to be worthless, in which case she will be left where she is, or supposed to be worth something to him, in which case he will be held to spend the money necessary to rescue her on his own account and for his own purposes only, in which case the expenditure cannot be the subject of general average.

These principles, though they deal with different epochs, so to speak, in the chain of events which give rise to general average, the first dealing with the state of things at the commencement of the liability, and the other with a state of things at which the liability has terminated, have this in common. Both point to the necessity, in order to establish a case of general average, for the existence of common danger of destruction at the moment when the liability is incurred. This necessity is laid down as the cardinal element necessary to establish a general average contribution in Arnould on Insurance, p. 917 (1st ed.), p. 934 (2nd ed.), where the learned author says, "All which is ultimately saved out of the whole adventure, i.e., ship, freight, and cargo, contributes to make good the general average loss, *provided it have been actually at risk at the time such loss was incurred, but not otherwise,* because if not at risk at the time of the loss, it was not saved

(1) 13 Q. B. D. 69.
(2) Law Rep. 7 Ex. 39.
(3) 6 E. & B. 779.
(4) 7 E. & B. 523.
(5) 13 Q. B. D. 69, at p. 80.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

Wills, J.

thereby." This, however, is not a complete statement of what things are liable to general average, for goods jettisoned themselves contribute, and after they are thrown overboard they are no longer at risk: and yet no one ever contended that as each parcel or bale went over the side and was swallowed up by the waves, its liability to be carried into the account of future general average ceased, leaving the burden to be borne in a continually increasing ratio by the ship and its continually decreasing contents. It seems to follow that the loss spoken of must be regarded as a whole, and as that resulting from a continuity of operations. Mr. Arnould's proposition, to make it complete, must be amplified. Property, I think it may be said, whether ultimately saved or jettisoned, actually at risk at any time during which the operation causing loss has been going on (comprehending under that phrase all such acts as may be properly considered as forming together one whole), is liable to contribution, provided that in consequence of that operation the whole adventure be preserved from destruction, because, if it was not at risk during any part of that time, no adventure of which it formed one of the constituents was saved by the operation. It is clear that Mr. Arnould's "loss" includes both jettison and expenditure to save ship and cargo from destruction.

It is obvious that if, in such a case, portions of cargo removed from the ship instead of being jettisoned are carried on shore in lighters and put in a place of safety, or are kept in the lighters and ultimately replaced in the ship, questions may arise whether such treatment is to be considered as the equivalent of jettison, or as the equivalent of remaining on board the ship, in either of which cases, as it seems to me, the liability to general average must ensue, or as a removal of a totally different character not subjecting the goods to contribution. If the object of the removal has been the lightening of the ship for the common safety, and the object of effecting the removal in such a fashion as to avoid jettison has been to do to that which must be got overboard something less wasteful than actual jettison, there seems to be no reason whatever for drawing a distinction between such a case and that of actual jettison, so far as liability to general average is concerned. But if the lightening of the ship formed

no part, or no appreciable part, of the purpose for which the removal was effected, if the object of the removal was not to minimise the cost of jettison but to get out of harm's way the thing removed and to prevent it from being or remaining at risk at all, it seems to me that a different result may very well ensue, and that a portion of cargo landed under such circumstances may well be regarded as separated from the adventure, and no longer liable to contribution. There is authority for saying that the purpose for which an act causing loss is done may determine whether it constitutes general average or not. It is said in Abbott on Shipping, 7th ed., p. 479, to have been "considered" that where bullion was thrown overboard to escape capture by an enemy the loss was not general average, and the author gives as the reason that the jettison in case of pursuit by an enemy, in order to constitute a case of general average, must be for the purpose of saving ship and cargo by lightening her and increasing her speed. A reference is given to *Butler* v. *Wildman*. (1) The question in that case was whether such a loss was covered by a policy of insurance. It was said incidentally by Holroyd, J., that jettison under these circumstances would not be general average, and the observation is but an obiter dictum, but it is adopted by Lord Tenterden, and shews that the purpose for which an act causing loss is done must be regarded in determining whether it gives rise to general average contribution, and it illustrates the principle that if the act be not done to avert some danger common to ship and cargo, it does not constitute a case of general average. Mr. Lowndes has some pertinent observations in a passage dealing with the case where the ship and cargo are placed in a situation which may probably but not certainly result in total wreck. In the earlier stages he points out the difficulty of saying whether what is done is for the common safety or for the rescuing of the property piecemeal, and expresses the opinion that the purpose rather than the result shall govern the allowance, adding a warning against the natural tendency "to accept accomplished facts" and to settle the question of purpose by reference to the result (Lowndes on General Average, 3rd ed., p. 147).

(1) 3 B. & Ald. 398.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

Wills, J.

Cases, no doubt, may occur in which it may be difficult to say whether the purpose for which goods are removed is that of lightening the ship or of saving the goods, and there will no doubt from time to time be instances in which it is impossible to separate the one purpose from the other. "The mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet if it is also done for the purpose of lightening the vessel and as a means of causing her to float, and of saving her from the common peril will not necessarily divest the transaction of its character as an act performed for the joint benefit of ship and cargo": *McAndrews* v. *Thatcher* (1) in the Supreme Court of the United States. It is impossible with reference to such a matter to lay down any rigid or inflexible rule. The question will be one of circumstance and degree, and each case must depend upon its own facts. In the present instance, however, there seems to me to be no room for reasonable doubt that the predominant and probably the only object aimed at in sending the specie ashore was to put it beyond the reach of the peril to which the ship and the rest of the cargo remained exposed. From the fact that the master sent the mail-boat to Bahia as early as possible and that the agent there immediately set to work to hire tugs and lighters, I have no doubt that it was present to the mind of the master very soon after the ship grounded that it would be necessary at all cost to lighten her, and that the jettison was delayed only because he hoped to be able to substitute for it the less disastrous expedient of getting the cargo ashore or into lighters. But I have equally little doubt that the specie was sent ashore not to lighten the vessel but to put such valuable property beyond the reach of possible danger by reason of the ship's breaking up or going to the bottom when she came off. What is the first step we always hear of when a vessel is wrecked? That the passengers and specie are put ashore. Specie is seldom aboard in quantities large enough for its removal to make any appreciable difference to the ship's chances of getting off when aground. The whole of the specie in this case weighed we are told about a ton and half. The *Tagus* is a vessel of some 3000 tons burthen. The ease to the vessel could be nothing at

(1) 3 Wallace, 347, at p. 370.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

Wills, J.

all. The combined value and smallness of total weight would be certain in any case to save the specie from jettison. Its value and the facility with which it could be got ashore would be certain, in any case where it was possible to land it, to save it from being left on board, and I cannot doubt that its removal was carried out not in any sense or degree as a means of securing the common safety of ship and cargo, but simply for the purpose of saving the specie itself. I think, therefore, that when the general average loss was incurred, in whatever sense, restricted or enlarged, that phrase can be properly used, it had ceased to be at risk, that upon no reasonable view of the facts can its removal be considered as a part of the means taken for saving any common adventure. I am consequently of opinion that it is not liable, using the words of the special case, "to contribute to the jettison or to any of the expenses of getting the ship off the ground incurred after it was landed."

It is objected that the master has no right to prefer one part of the cargo to another, and to favour it at the expense of the rest. I make two answers. First, it is not a question of what the master had a right to do, but of what was done. He may have acted wrongly, but it is none the less the fact that the specie *was* landed, and was landed with the object of putting it out of the way of danger and not of helping the general adventure. Secondly, I do not see any reason to suppose that it was favoured at the expense or to the detriment of the chances of the rest of the adventure. The objection, moreover, is founded, I think, upon an erroneous view of the master's duty in such a case. It was laid down in the very learned and elaborate judgment of the Exchequer Chamber delivered by Willes, J., in *Notara* v. *Henderson* (1), that a shipowner is a bailee of the goods entrusted to him for carriage in his ship, and that although exempt under the bill of lading from the absolute liability of a common carrier, he is yet bound to use reasonable care in respect of the goods he carries, and it follows that if the master, when it was easy to land the specie, neglected so to do and it was lost in consequence of his neglect, the shipowner would be liable. The master of a ship is under the same obligation as every one else having duties to

(1) Law Rep. 7 Q. B. 225, at p. 235.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

Wills, J.

perform to act as a reasonable man in performing them. Specie, owing to its small bulk, can be placed in safety with exceptional facility. Its great value makes it exceptionally desirable to save it if possible. Suppose that two boxes of equal bulk and equal weight lay side by side in the ship's hold, and that one was filled with gold and the other with iron, and that only one could be saved, would any one contend that a master who saved the iron in preference to the gold would be acting reasonably? It is pointed out in the judgment of the Exchequer Chamber in *Notara* v. *Henderson* (1) that many of the Continental codes expressly recognise and enforce the duty of the master in such a case to place the more valuable article in safety before the other.

This observation answers another objection that was raised. To decide that the specie was not liable to general average contribution would, it was said, be to hold out an irresistible temptation to the master to leave the specie at all events on board so as to insure its contribution to general average. A jury or any other tribunal having to determine whether the specie had been lost through the negligence of the master would, I should think, make very short work of it, if it were shewn that when it was easy to save the specie without adding to the difficulties of either ship or cargo in general, the master had forborne to do so in order to make certain that it should not escape contribution to general average. Moreover, there are two sides even to that question. The specie might in the end be lost though the ship and the cargo in general, or a substantial portion of it, were saved, and then the amount of general average to be made up in part by the ship and the cargo would be enormously increased. I cannot but think that the danger suggested is chimerical, but whether it be real or imaginary, it is no reason for departing from the clear and well-established principles which appear to me to govern this case. I am therefore of opinion that our judgment should be for the defendants.

GRANTHAM, J. I also am of opinion that our judgment must be for the defendants. It was admitted by the Attorney General

(1) Law Rep. 7 Q. B. 225.

that unless he could distinguish this case from the cases of *Job* v. *Langton* (1) and *Walthew* v. *Mavrojani* (2), our judgment must be against him, and I am of opinion that, although the facts are not identical, yet that on the principles of law deducible from those cases, the defendants as owners of the specie landed from the *Tagus* under the circumstances set forth in the special case, are not liable for general average for the losses and expenses subsequently incurred in getting the ship off the reef on which she had struck. The law as applied in the English courts seems to differ materially from the law applied in the American courts, and although there may be on grounds of general policy some advantages in adopting the American view, yet there can be no doubt that our English Courts have followed more closely the original principles of the doctrine of general average contribution.

According to the decisions of our English Courts if the cargo sought to be made liable for general average contribution has been at the time of the loss and expenditure removed to a place of safety and is not subject to the particular peril which causes the special loss and expenditure, then such cargo is not liable to general average contribution in respect of such charges. The only difficulty that arose in this case arose from the apparently conflicting cases of *Moran* v. *Jones* (3) and *Job* v. *Langton* (1), because the Attorney General was in one aspect of the case able to bring the facts of the case nearly within the law as applied in the former case; but as that case has not been since followed even if it has not been overruled, we could not act upon that decision unless the facts were absolutely identical.

Looking at the log-book and at the protest of the captain and crew of the *Tagus*, I have come to the conclusion that the landing of the specie was not done in pursuance of the common purpose of lightening the ship to get her off the reef and so enabling her to continue her voyage, but was done for the same purpose that the passengers and their baggage were landed for, viz., for safety to the persons and things landed, they being respectively the most important parts of the cargo on board.

(1) 6 E. & B. 779. (2) Law Rep. 5 Ex. 116.
(3) 7 E. & B. 523.

1887

ROYAL MAIL STEAM PACKET CO. v. ENGLISH BANK OF RIO DE JANEIRO.

Grantham, J.

The captain having thus freed himself from his responsibility for the immediate safety of the passengers and specie, waited to see what turn events would take, and his subsequent action was the result of a subsequent judgment formed by him as to the best course to adopt, and was not the result of a single and original intention partly carried out by landing the passengers and specie as mentioned in the case. This view of his conduct is, I think, completely justified by the language of the protest, from which the difference in the action of the captain on the 28th and 29th fully appears. "The forenoon," he writes, "was spent in landing the remainder of the passengers and specie, the afternoon was occupied in discharging passengers' effects. At 7 P.M. a moderate breeze blowing, &c." Apparently, therefore, nothing more was done on the 28th after the passengers' effects were landed, and no idea was then formed of throwing cargo overboard. But the protest tells us "at 5 A.M. on the 29th" (the day after the landing of the specie), "the master of the said vessel deemed it expedient, as the only means of saving the vessel, to throw overboard the cargo and ballast." "The cargo" does not include the specie which was already landed. What other interpretation can be put upon this language than that having landed the passengers and specie he waited to see what the next morning would bring forth, and finding when it came that the ship was in greater peril he determined to incur the expense and loss which is the subject of the general average claim? But in *Moran* v. *Jones* (1) the ship had become a wreck before the cargo was got out, and there can be no doubt that the cargo was got out not only for the safety of the cargo, but for the purpose of lightening the ship. The Attorney General very adroitly confused the term safety of the cargo as applied to its safety from perils of the sea with the safety of the cargo as applied to the necessity of protecting it from pillage on shore, and argued that as it remained on shore under the charge of the officers of the ship, therefore unity of control was the same as unity of danger; but a little examination of the facts soon exposed the fallacy of this argument, because, if it were allowed to hold good, then in case no further loss or expense had been

(1) 7 E. & B. 523.

incurred to the ship or rest of the cargo, but a guard of soldiers had been paid by the captain to look after the specie and save it from pillage by the islanders, the ship and cargo would have been liable to contribute for such expenses under the head of general average loss. For these reasons I am of opinion that our judgment must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Wilson, Bristow, & Carpmael.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

H. D. W.

WILSON *v.* GLOSSOP.

April 4, 5; *May* 2.

Husband and Wife—Liability of Husband for Necessaries supplied to Wife—Adultery of Wife—Connivance by Husband—Condonation.

In an action against a husband for necessaries supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support; and that the plaintiff supplied her with the necessaries in question while she was living separate from her husband:—

Held, that the husband was liable.

ACTION for 40*l.*, for forty weeks' maintenance of the wife of the defendant, tried in the Sheffield County Court without a jury. The facts were as follows:—In August, 1885, the defendant charged his wife with adultery, and turned her out of his house without any means of support; whereupon she went to reside with her mother, the plaintiff, who supplied her with board and lodging. The defendant subsequently petitioned in the Probate and Divorce Division for a dissolution of his marriage on the ground of his wife's adultery, and at the trial the jury found that the wife had committed adultery; and that the petitioner had not condoned the adultery committed by the wife; but that the petitioner had connived at the adultery committed by her. The petition was thereupon dismissed.

The defence set up to the action for necessaries was the wife's adultery, to which it was answered that the husband's connivance

1887

WILSON v. GLOSSOP.

precluded him from relying upon his wife's adultery as a defence.

The county court judge gave judgment for the defendant.

The plaintiff appealed.

Herbert Reed, for the plaintiff. The reason why a husband is not bound to maintain his wife after she has committed adultery is, the wrong suffered by him; but no wrong is done to a man who by his connivance is the author of his own dishonour: Volenti non fit injuria.

[He cited *Robinson* v. *Gosnold* (1); *Govier* v. *Hancock* (2); *Morton* v. *Fazan* (3); *Hunt* v. *De Blaquière* (4), and *Culley* v. *Charman*. (5)]

Moorsom, Q.C. (*Cyril Dodd* with him), for the defendant. The true test of the defendant's liability is, not whether he was a party consenting to his own dishonour, but whether the wife's misconduct did or did not operate as a revocation of her implied authority to bind him by her contract for necessaries.

[He cited *Manby* v. *Scott* (6); *Cox* v. *Kitchin* (7); *Harris* v. *Morris* (8); *Mainwaring* v. *Leslie* (9); *Drew* v. *Drew* (10); *Woodward* v. *Dowse*. (11)]

Reed, in reply.

Cur. adv. vult.

May 2. The judgment of the Court (Mathew and Cave, JJ.,) was delivered by

CAVE, J. This was an appeal from a judgment of the county court of Sheffield, holding that a husband is not liable for his wife's maintenance after her adultery, although he was guilty of connivance. The case was argued before Mathew, J., and myself, on April 4 and 5 last, and I have now to deliver the judgment of the Court.

For the purposes of this case, it must be taken that the wife

(1) 6 Mod. 171.
(2) 6 T. R. 603.
(3) 1 B. & P. 226.
(4) 5 Bing. 550.
(5) 7 Q. B. D. 89.
(6) 1 Keble, 69, 80, 87, 206, 337, 361, 383, 429, 441, 482; 1 Sid. 109; 1 Lev. 4.
(7) 1 B. & P. 338.
(8) 4 Esp. 41.
(9) M. & M. 18.
(10) 1 Notes of Eccl. C. 315.
(11) 10 C. B. (N.S.) 722.

committed adultery with the connivance of her husband, that the husband subsequently turned her out of doors, that she had no means of support, and that the plaintiff supplied her with necessaries and brought this action against the husband to recover the sum so expended.

It is undoubted law, that, if a husband without any justifiable cause turns away his wife, he is bound by any contract she may make for necessaries suitable to her degree and estate: per Bayley, J., *Montague* v. *Benedict.* (1) We can nowhere find any statement of what is justifiable cause in point of law for turning a wife out of doors. According to the earlier authorities, adultery is not such a cause. Thus, in *Robinson* v. *Gosnold* (2), an opinion expressed by Holt, C.J., at nisi prius, is given in the following terms: "Let the woman be ever so vicious, yet while she will cohabit with her husband he is bound to provide necessaries for her, and is liable to the actions of such persons as furnish her with them; for, his bargain was to take her for better for worse. In like manner it is if the husband turns his wife away for her wickedness, he remains still chargeable for her necessaries. But, if the wife leave her husband, they that trust her after it is notorious that she has left him do it at their peril, and shall not thereupon charge the husband." So, again, in *Manby* v. *Scott* (3), Hale, C.B., says: "Also, if the wife cohabits with her husband, and is ever so lewd, he shall be liable for her maintenance; for, he took her for better for worse: so, if he runs away from her, or turns her away, or forces her by cruelty or ill usage to go away from him." Again, in *Hunt* v. *De Blaquière* (4), Best, C.J., says: "If a man turns his wife out of doors, it has been said by judge after judge that he sends her forth with an implied credit for necessaries. This is the general law; and the defendant is liable under it, unless the obligation cast on him by turning his wife out be discharged by something subsequent." But, however this may be, it is at all events admitted that a husband has no right to turn his wife out of doors under circumstances that would not disentitle her to succeed in an action for restitution of conjugal rights.

(1) 3 B. & C. 631, 635.
(2) 6 Mod. 171.
(3) Bac. Abr. Baron & Feme, (H.).
(4) 5 Bing. 550, 557.

1887

WILSON v. GLOSSOP.

Cave, J.

Mr. Moorsom, in his able argument, cited *Drew* v. *Drew* (1) as deciding that the adultery of the wife is a bar to a suit by her for restitution of conjugal rights, even though the husband has connived at her adultery. But, when the case is looked into, it will be found that it does not really decide that point. The suit was originally one for restitution of conjugal rights. By way of bar to this suit, the husband pleaded that his wife had committed adultery, and prayed for a decree on that ground. The cause then resolved itself into a suit of that nature; in answer to which the wife alleged in bar,—first, that the husband had himself committed adultery,—secondly, that he had connived at her adultery. These matters, it will be seen, were pleaded in reply to the husband's plea in bar to the claim for restitution: and the question whether connivance is an answer to a plea of adultery in such a suit was neither decided nor argued. There are, however, two cases in which, although not decided, the point was discussed. The first is *Seaver* v. *Seaver* (2), decided in the Consistorial Court in Dublin in 1846. That was an action by the wife against the husband for restitution of conjugal rights. The husband pleaded adultery of the wife in bar; to which she replied the adultery of the husband: and it was held by the Consistorial Court, and afterwards, on appeal, in the Court of Delegates, that the replication was good.

It seems clear that by the canon law an adulterous wife was entitled to a restitution of conjugal rights, if the husband, (1) had himself committed adultery, or (2) had connived at, or (3) had condoned his wife's adultery: and the question in *Seaver* v. *Seaver* (2) was whether this had become the law of England in its whole extent. After considering the authorities, the learned judge of the Consistorial Court arrived at the conclusion that by our law condonation or connivance would prevent a husband from relying on his wife's adultery so condoned or connived at as a bar to her suit for restitution. The same point came before the Court for Divorce and Matrimonial Causes in 1858, in a suit of *Hope* v. *Hope* (3), where, however, the learned Judge Ordinary came to a different conclusion to that at which the Irish Courts

(1) Notes of Cases Ecclesiastical and Maritime, 315.

(2) 2 Sw. & Tr. App. 2, p. 665.

(3) 1 Sw. & Tr. 94.

had arrived on the subject of mutual adultery. On the subject of connivance and condonation the learned judge expressed the following views: "By connivance, in this (a passage cited from Oughton's Ordo Judiciorium) and other passages, I take it that the party is supposed so to connive as to give a willing consent to the act, although not an accessory before the fact: in such a case it is consistent with reason to say that the party so consenting shall not be allowed to take advantage of the guilt contracted by doing the act consented to. So, as to condonation, it is reasonable to say that an offence which has been blotted out by forgiveness shall not afterwards be made the subject-matter of accusation. But the same observation is not strictly applicable to a case of compensation by mutual guilt. Both break the sacred obligation into which they have entered; neither instigates or consents to, neither pardons, the offence of the other; and, although it may not be competent to either to obtain the assistance of a Court to punish the offence committed, it by no means follows as a reasonable consequence that each shall be bound to treat the other as an innocent party." This view the learned judge supported (amongst other authorities) by a reference to *Govier* v. *Hancock* (1) and *Rex* v. *Flintan.* (2) In the former of these cases it was held that a husband was not bound to support his wife, where he had turned her out of doors and she had afterwards committed adultery. In the second it was held that a man was not liable to a penalty under the 5 Geo. 4, c. 83, s. 3, for refusing to maintain his wife who had committed adultery and then voluntarily left him.

Mr. Moorsom relied somewhat on the former case, on the ground that, if adultery accompanied by any gross misconduct did not compensate the wife's adultery, connivance, which was only another form of misconduct, should be equally powerless. But, as we have seen, Cresswell, J.O., in *Hope* v. *Hope* (3), drew a distinction between mutual guilt, which he held not to be compensation, and connivance, which he admitted would entitle an adulterous wife to sue for restitution of conjugal rights. Moreover, in *Gover* v. *Hancock* (1), the wife when she was turned out of doors

(1) 6 T. R. 603. (2) 1 B. & Ad. 227.

(3) 1 Sw. & Tr. 94.

1887

WILSON v. GLOSSOP.

Cave, J.

had authority to pledge her husband's credit; and if, having that resource, she nevertheless committed adultery, she placed herself in a similar position to a woman who leaves her husband's house with an adulterer. In *Harris* v. *Morris* (1), it was held by Lord Kenyon, C.J., that, if a husband condones his wife's adultery, and takes her back into his house, and afterwards turns her out of doors, he is liable for necessaries furnished to her. This is in accordance with the judgment of the Irish Court and the opinion of Cresswell, J.O.: and, if a husband is liable to maintain a wife whose adultery he has condoned, it seems to be equally just that he should be liable for necessaries supplied to his wife whose adultery he has connived at. In the one case, he has forgiven the wrong done him: in the other, he consented to it, and the maxim volenti non fit injuria applies.

The appeal must be allowed, and judgment entered for the plaintiff for 40*l.*, with costs here and below.

Judgment for the plaintiff.

Solicitors for plaintiff: *Minter & Morris, for Parker & Brailford, Sheffield.*

Solicitors for defendant: *Clegg & Sons, Sheffield.*

(1) 4 Esp. 41.

J. S.

[IN THE COURT OF APPEAL.]

1887
May 25.

THE GUARDIANS OF THE POOR OF THE CROYDON UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF THE REIGATE UNION, RESPONDENTS.

Poor Law—Settlement—"Widowed Mother"—Child under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

A pauper under the age of sixteen, whose father was dead and whose mother resided abroad, having become chargeable to a parish in the respondent union, an order was made for her removal into the appellant union, where her deceased father had during his lifetime acquired a settlement:—

Held, affirming the judgment of the Queen's Bench Division, that the order was bad; that the language of s. 35 of the Divided Parishes Act, 1876, is to be interpreted with reference to the moment of adjudication upon the application for an order of removal; that the word "wife" in that section therefore does not include a widow, and that under the words "shall take the settlement of its father, or of its widowed mother, as the case may be," the pauper took her mother's birth settlement, as being the settlement of her surviving parent at the moment of adjudication.

Guardians of Maidstone Union v. *Guardians of Holborn Union* (17 Q. B. D. 817) and *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (18 Q. B. D. 528) discussed and approved.

SPECIAL CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11, on appeal against an order of removal.

On May 8, 1886, upon the application of the respondents, two justices of the county of Surrey made an order under s. 97 of 16 & 17 Vict. c. 97, adjudging the place of the last legal settlement of Edith Scully to be in the hamlet of Penge in the appellants' union.

Edith Scully, the pauper lunatic, was born about the year 1875, and was under the age of sixteen when the order was made; she was the daughter of Richard Scully (deceased) and his wife Emma Scully.

Emma Scully was born in the parish of Reigate Foreign, in the respondents' union, which was and is her maiden settlement. She never acquired any subsequent settlement in her own right.

Her husband, Richard Scully, whilst resident with her about the year 1878, acquired a settlement in the hamlet of Penge, in

1887

GUARDIANS OF CROYDON v. GUARDIANS OF REIGATE.

the appellants' union, by renting a tenement and being charged with and paying rates and taxes.

In 1880 Richard Scully left England for Gibraltar, where in 1881 he was joined by his wife, who has resided there ever since.

In 1881 Richard Scully died at Gibraltar.

The appellants contended that the pauper lunatic was not settled in the hamlet of Penge, but took the maiden settlement of her "widowed mother," Emma Scully, viz., that of her birth in the parish of Reigate Foreign, in the respondents' union.

The respondents contended that the pauper lunatic took the settlement of her deceased father, viz., that acquired by him in the hamlet of Penge, in the appellants' union.

The question for the opinion of the Court was, Was the order rightly made adjudging the settlement of the pauper lunatic to be in the hamlet of Penge?

It was agreed between the parties that a judgment in conformity with the decision of the Court, with costs, might be entered on motion by either party at the quarter sessions for the county of Surrey next, or next but one, after such decision should have been given.

By s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61): "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

The Queen's Bench Division (A. L. Smith and Grantham, JJ.) quashed the order upon the authority of *Guardians of Maidstone Union* v. *Guardians of Holborn Union*. (1)

The respondents (2) appealed.

Charles, Q.C., and *Burleigh Muir*, for the respondents. The effect of s. 35 is that the wife and child took the husband's settlement during his life and retained it after his death, the

(1) 17 Q. B. D. 817.

(2) The terms "appellants" and "respondents" are used throughout with reference to the appeal to quarter sessions and not to that in the Court of Appeal.

settlement of the wife being excepted from the general abolition of derivative settlements. The case of *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (1) will be relied on as an authority to the contrary, but that case was wrongly decided; the attention of the Court was not called to the case of *Guardians of Liverpool* v. *Overseers of Portsea* (2), which is a distinct authority that where a widowed mother has not acquired a settlement for herself after her husband's death, the child takes the settlement of the father. This necessarily follows from the words of s. 35 that a child under sixteen is to take the settlement of its father or of its widowed mother, "as the case may be," which point to the acquisition of a settlement by the widowed mother, and which, fairly interpreted, mean that the child is to take its widowed mother's settlement if she has acquired one for herself; otherwise it is to take its father's settlement.

In *Reg.* v. *Guardians of Bridgnorth* (3), which decided that the settlement of the child's grandfather cannot be inquired into, Cave, J., expresses a clear opinion (4) that "a legitimate child will, up to the age of sixteen, take the last settlement which the widowed mother may have acquired in her own right after the death of its father, or, failing that, it will take the last settlement which the father shall have acquired in his own right." This is the natural construction of the language of s. 35, and *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (1) and *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (5), which followed it, should be overruled.

[They also cited *Guardians of Headington Union* v. *Guardians of St. Olave's Union* (6); *Keynsham Union* v. *Bedminster Union* (7); *Guardians of Edmonton* v. *Guardians of St. Mary, Islington.* (8)]

Bosanquet, Q.C., and *Mead*, for the appellants, were not called on.

LORD ESHER, M.R. In the first place, I adhere to what was said by this Court in *Reg.* v. *Guardians of Bridgnorth* (9), that

(1) 17 Q. B. D. 817.
(2) 12 Q. B. D. 303.
(3) 9 Q. B. D. 765; 11 Ib. 314.
(4) 9 Q. B. D. 777.
(5) 18 Q. B. D. 528.
(6) 13 Q. B. D. 293.
(7) 3 Q. B. D. 344.
(8) 15 Q. B. D. 95; Ib. 339.
(9) 11 Q. B. D. 314.

1887

GUARDIANS OF CROYDON v. GUARDIANS OF REIGATE.

Lord Esher, M.R.

"no person" means the person whose case is under discussion, and who is to be removed. And I further agree with what was said in that case, that the moment of time which governs the question of settlement is the time when the proper persons have to make up their minds as to the removal, in other words, the moment of adjudication. In the next place, when we are dealing with that person and that moment of time, the only safe thing to do is to read each word with reference to its ordinary meaning as applied to "any person" at that moment of time. The principal enactment of s. 35 is contained in the words "No person shall be deemed to have derived a settlement," and those words, in conjunction with the succeeding words, "from any other person," sweep away at once all derivative settlements. Then comes the exception, "Except in the case of a wife from her husband." Dealing with that moment of time, the moment of adjudication, the Act says "wife," not a person who has been, or will be, a wife, but who is so at that moment; if she is then a wife she is excepted from the operation of the section; if not, she is included in the general prohibition of derivative settlements. A widow who has been a wife, but is not so at the moment of adjudication, cannot be called a wife; she does not fall within the exception, but comes under the general enactment. Then the section goes on to deal with the further exception of a child under sixteen. In the first place, it is to take the settlement of its father; that is to say, if at the moment with which we are dealing the child under sixteen has a father living, then its father's settlement is its own settlement; it has a derivative settlement from its father, being under sixteen. Then the section goes on, "or of its widowed mother, as the case may be," which means that the widowed mother's settlement is only available in the case of a child who has had a father but has lost him before the moment of adjudication; for there can be no widowed mother until the father is dead. The words "as the case may be" point to the survival of either parent; that is to say, if at the moment of adjudication the father is alive, the child takes the father's settlement; if his widowed mother is alive he takes hers.

If then the child takes the settlement of the widowed mother,

what is her settlement? It may be either that which she has of herself or that which she has derived. If it was her husband's settlement it was derived from him; but an inquiry into this is precluded by the section, for we cannot look at her derivative settlement. What settlement of the widowed mother can we then look at? She may have acquired one for herself; it is possible if she was not married until she was of mature age; but if she has acquired none by any act of her own, her only settlement which is not derivative is her birth settlement. The case calls this her maiden settlement, which includes any settlement acquired before marriage, and, if no other has been acquired, means of course the place of her birth. Giving this interpretation to the section, what are the decisions which should be adopted here? I adopt the decision and the reasons given for it in *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (1), it is one which, in my view, is wholesome, good, and right. It was the case of a widow, and I think that Mathew, J., came to a sound conclusion when he held that in inquiring into the settlement of a woman the Court cannot look at the settlement which she has derived from her husband, unless at the moment of adjudication she is a wife, reading that word as meaning what it says, a "wife," and not a "widow;" if she is a wife she will go with her husband, if a widow her settlement will not follow his. I also adopt the reasoning of Day, J., in *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (2) that the object of the section is to abolish derivative settlements except where it would cause injustice to do so, and that it is not intended to separate a wife from her husband during marriage, or children of tender years from their parents, or from their surviving parent, if either the father or mother is dead. If the father is alive and the mother dead the children go with the father; if the mother is alive and the father dead then the mother is a "widowed mother," and the children go to her place of settlement. In my opinion, the judges in the Queen's Bench Division decided the present case quite rightly, and their decision is in entire accordance with that in the *Bridgnorth Case*. (3)

(1) 17 Q. B. D. 817. (2) 18 Q. B. D. 528.
(3) 9 Q. B. D. 765; 11 Ib. 314.

1887

GUARDIANS OF CROYDON v. GUARDIANS OF REIGATE.

FRY, L.J. I think that this appeal must fail. I do not say that the section is easy to construe, but there is a stream of decisions upon it which makes its meaning fairly clear. The object of the first part of the first clause is plain: it is to sweep away and render unnecessary expensive and intricate inquiries into derivative settlements. Then there come two exceptions to the general enactment, arising in the case of persons closely related, the first of which runs thus, "except in the case of a wife from her husband." Mr. Charles has argued that the exception is the "settlement" of the wife, and that the effect of the clause is to reintroduce the old law as to a wife or widow retaining her acquired settlement. I do not agree in this contention, and for two reasons. In the first place the exception was introduced for the sake of humanity; it was intended to prevent the separation of married couples, and to ensure that the living wife should go with her living husband; it has nothing to do with the settlement of a wife who has become a widow. Secondly, the exception should be read narrowly, so as to prevent the holding of intricate inquiries. An inquiry into a man's settlement while he is living is generally easy; but if he is dead the inquiry almost necessarily becomes more intricate. The spirit of the Act requires us to read the exception as narrowly as we can, and I think it must clearly be confined to the single case of the living wife and living husband. Then comes the second exception, that of a child under sixteen. The clause directs that it shall retain the settlement taken by it under the age of sixteen until another is acquired; and this throws some light on the question of the wife retaining her settlement as a wife when she becomes a widow, for nothing is there said as to a child over sixteen retaining a derivative settlement. What then is the extent of the exception as to children? If the father is living they go with him; if the mother is also living she goes too; they all go together; and this is a humane policy. If the father only is alive the children go with him; but if he is dead and their mother is alive they go with their widowed mother. The widowed mother not having retained her derivative settlement, the children go with her to the settlement (other than a derivative settlement) which was hers before she contracted the

marriage. This arrangement is at once reasonable and humane; it gives a narrow construction to the exception, and shuts out long and intricate inquiries; and it is moreover consistent with the decisions in *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (1), and in *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (2), in both of which I entirely concur.

Judgment for the appellants.

Solicitors for appellants: *West, King, Adams & Co.*

Solicitors for respondents: *Morrisons, for G. C. Morrison, Reigate.*

W. J. B.

[IN THE COURT OF APPEAL.]

Aug. 1.

WATSON *v.* STRICKLAND & SONS.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Statutory Form, Deviation from—Covenant to pay Interest on Mortgages of Premises—Provision as to Possession of Instrument after payment of Sums secured.*

A bill of sale given as a security for the payment of money contained a covenant for the payment by the grantor of all interest on mortgages, if any, of the premises on which the goods assigned were or to which they might be removed, and also a stipulation that, as soon as the sums secured were satisfied, the grantee would give a receipt in full of all demands and indorse a copy of the same on the bill of sale, but the bill of sale and any documents signed by the grantor or any other person in relation to the loan should remain in the custody and be the property of the grantee:—

Held, that both of these stipulations were deviations from the statutory form given by the Bills of Sale Act, 1882, and that the bill of sale was therefore void.

APPEAL from the judgment of Mathew, J., on the trial of an interpleader issue.

The facts were as follows:—

The plaintiff claimed under a bill of sale goods which had been taken in execution, the defendants being the execution creditors.

The bill of sale, which was given after 1882 as security for the repayment of money, contained the following among other provi-

(1) 17 Q. B. D. 817. (2) 18 Q. B. D. 528.

1887

WATSON v. STRICKLAND.

sions, viz., a covenant by the grantor to pay all rents, rates, taxes, and interest on mortgages, if any, payable in respect of the premises on which the said goods then were or to which they might be removed with such consent as aforesaid; and also a stipulation that, as soon as all sums secured by the bill of sale were fully paid and satisfied by payment or sale of the said goods or otherwise, the said mortgagee would, at the request and cost of the said mortgagor, give a receipt in full of all demands under or in respect of the premises and indorse a copy thereof on the bill of sale, but the bill of sale and any document signed by the said mortgagor or any other person in relation to the said loan should remain in the custody and be the property of the said mortgagee.

The learned judge held that both the above-mentioned provisions avoided the bill of sale as not being in conformity with the form in the schedule to the Bills of Sale Act, 1882, and he therefore gave judgment for the defendants.

Lyon, for the plaintiff, contended that it was competent to the parties to insert the covenant for payment of interest on mortgages as being a term for the maintenance of the security, inasmuch as there might be a power of distress created by a mortgage under which the goods assigned might be liable to seizure: and that the stipulation as to possession of the bill of sale and other documents after the satisfaction of the sums secured was immaterial, or of too trifling a character to amount to a substantial deviation from the statutory form.

[He cited *Furber* v. *Cobb* (1); *Ex parte Stanford, In re Barber*. (2)]

H. Tindal Atkinson, and *Lacey Smith*, for the defendants, were not called upon.

LORD ESHER, M.R. I am of opinion that both of these stipulations are fatal to the bill of sale. There is nothing in the statutory form like the stipulation with regard to the possession of the instrument and other documents after the payment of the money secured by the bill of sale. Therefore it must avoid

(1) 18 Q. B. D. 494. (2) 17 Q. B. D. 259.

the bill of sale unless it can be shewn to be wholly immaterial or futile. I do not think that can be shewn. It obviously alters the ordinary rights of the parties, for by the ordinary law and practice the mortgagor on the bill of sale becoming satisfied would be entitled to have the bill of sale and other documents connected with the loan back again, and not to have them left in the hands of the mortgagee. It has been suggested that this is a stipulation originally devised by some money lender in order to throw difficulties in the way of legal proceedings by the grantors of bills of sale when they have anything to complain of in respect of what may have occurred while the security was in force. Whatever the object, it alters the rights of the parties from what they would be under the statutory form. The stipulation as to the payment of interest on mortgages of premises, on which the goods assigned are or to which they may be removed, is also in my opinion equally fatal. It was suggested that it was a provision for the maintenance of the security, because there might be a mortgage of the premises giving a power of distress over the goods of a stranger. But, assuming that could be so, this clause would cover mortgages which did not contain any such power of distress, and would oblige the grantor to pay the interest on such mortgages, though not made by himself but by others; and, if such interest were not paid, would make him liable as for breach of a covenant on the bill of sale. It is quite obvious that this goes far beyond anything that can be necessary for the maintenance of the security.

LINDLEY, L.J. I am of the same opinion. The stipulation with regard to the payment of interest on mortgages goes far beyond anything that could be necessary for the maintenance of the security. It would compel the grantor of the bill of sale to keep down the interest on mortgages of any amount, though the mortgagee might not be able to touch any of the goods included in the bill of sale. With regard to the other stipulation, which is new to me, whatever its object may be, the effect appears to be to disentitle the grantor to the possession of documents to which he would otherwise be entitled. It is not required for the purposes of the security, and it is contrary to the statutory form.

1887

WATSON v. STRICKLAND.

LOPES, L.J. I think the bill of sale void on both the grounds suggested. With regard to the stipulation as to the possession of the instrument and other documents after the security is satisfied, if it could be successfully contended that it was mere surplusage, the bill of sale might be supported. But I do not think that it is mere surplusage. It deprives the mortgagor of a right which properly belongs to him, and so alters the effect of the bill of sale from that of the form. The other provision objected to renders the grantor of the bill of sale liable to pay the interest not only on mortgages which confer a power of distress over the goods assigned but on mortgages made by other people which contain no such power. It is clear that such a stipulation is far wider than can be necessary for the maintenance of the security. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff: *Dodd, Longstaffe & Co.*
Solicitors for the defendant: *Marsden & Son.*

E. L.

Aug. 4.

[IN THE COURT OF APPEAL.]

WELDON *v.* NEAL.

Practice—Amendment—Claim barred by Statute of Limitations.

A plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations.

APPEAL of plaintiff from the order of the Queen's Bench Division (Field and Wills, JJ.) directing certain paragraphs of the statement of claim to be struck out.

The facts were as follows:—

The plaintiff commenced an action for slander on 1st September, 1883. At the trial the judge nonsuited the plaintiff on the ground that the alleged slander was not actionable without special damage, and that the plaintiff had not alleged any special damage, and refused to give leave to amend. The plaintiff subsequently obtained from the Court of Appeal an order for a new

trial with leave to amend her statement of claim. On the 6th April, 1887, she amended her statement of claim.

The statement of claim as amended set up in addition to the claim for slander fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by the Statute of Limitations, although not barred at the date of the writ.

The Divisional Court ordered the paragraphs stating such fresh causes of action to be struck out on the ground that amendments ought not to be allowed which would deprive the defendant of the benefit of the Statute of Limitations.

The plaintiff in person.

Wood-Hill, for the defendant, cited *Clarapede* v. *Commercial Union* (1); *Doyle* v. *Kaufman* (2); *Tildesley* v. *Harper* (3); *Steward* v. *North Metropolitan Tramways Co.* (4)

LORD ESHER, M.R. We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule. For these reasons I think the order of the Divisional Court was right and should be affirmed.

LINDLEY, L.J. I am of the same opinion. I do not think it would be just to the defendant to allow these amendments, the

(1) 32 W. R. 151, 262.
(2) 3 Q. B. D. 7.
(3) 10 Ch. D. 393.
(4) 16 Q. B. D. 178, 556.

1887

WELDON v. NEAL.

effect of which would be to deprive him of his defence under the Statute of Limitations.

LOPES, L.J. I am of the same opinion. I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, viz., that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side. But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant.

I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for defendant: *Neal.*

E. L.

June 14.

[IN THE COURT OF APPEAL.]

WIGHT *v.* SHAW.

Practice—Costs—Order LXV., r. 1*—Event—Claim admitted on Pleadings—Counter-claim.*

The plaintiff claimed 78*l.* 15*s.* in respect of a quarter's rent of premises let furnished to the defendant. The defendant by his pleadings admitted the claim, but counter-claimed a larger amount as damages in respect of the insanitary condition of the demised premises. The action was tried by a jury, who found for the defendant on the counter-claim with 17*l.* 16*s.* damages. The judge at the trial ordered that judgment should be entered for the plaintiff for the amount of the claim with costs down to the date of the counter-claim, and that judgment should be entered for the defendant for 17*l.* 16*s.* on the counter-claim, with the costs of the counter-claim and subsequent thereto including the costs of the trial:—

Held, that the effect of the judge's order as regards costs was to prevent them from following the "event," and that in the absence of "good cause" he had no jurisdiction to make such order.

APPEAL against part of the judgment of Denman, J., at the trial.

The facts were as follows:—

The plaintiff sued for 78*l.* 15*s.* in respect of a quarter's rent

due upon a demise of certain furnished premises to the defendant. The defendant by his pleading did not deny that the rent was due, but counter-claimed 142*l.* 13*s.* 6*d.* damages in respect of the insanitary condition of the demised premises, by reason whereof a guest and two servants of the defendant were attacked with diphtheria, and the defendant had to incur medical expenses, and certain repairs were ordered to be done by the sanitary authority during which the premises were rendered uninhabitable and the the defendant was put to expense in having to live elsewhere.

The plaintiff denied the allegations of the counter-claim. The action was tried before a jury. The verdict was entered for the plaintiff on the claim, and the jury found for the defendant on the counter-claim with 17*l.* 16*s.* damages. The learned judge directed that judgment should be entered for the plaintiff on the claim for 78*l.* 15*s.* with costs down to the date of the counter-claim, and that judgment should be entered for the defendant on the counter-claim for 17*l.* 16*s.*, and that the defendant should have the costs of the counter-claim and all costs since the counter-claim, including those of the trial, on the High Court scale. The plaintiff appealed against the part of the learned judge's judgment which related to the costs.

Willis, Q.C., and *H. Tindal Atkinson*, for the plaintiff. The learned judge had no jurisdiction to make this order with regard to costs. Unless some good cause is shewn he has no power to interfere with the costs: *Jones* v. *Curling*. (1) Under Order LXV., r. 1, the plaintiff was entitled to the costs of the cause, because the event as regards the balance was in his favour, and the defendant was entitled to the costs of the counter-claim. The learned judge has treated the case as if the defendant had paid the amount recovered by the plaintiff into court.

[LORD ESHER, M.R. Has not the defendant succeeded in respect of the only matter tried, viz., the counter-claim?]

It was apparently on that ground that the learned judge proceeded. But the plaintiff must go down to trial to get his balance. It is true that the parties went down to try the issues on the counter-claim only; but the plaintiff could not get his

(1) 13 Q. B. D. 262.

1887

WIGHT v. SHAW.

money without going to trial, because the amount counter-claimed covered his claim, and one of the issues involved in the action was whether the defendant was entitled on the counter-claim to an amount that would cover the claim. Under Order LXV., r. 1, the defendant would no doubt be entitled to all costs applicable to issues on which he has succeeded; for instance, to the costs on the issue whether the premises were insanitary, but he would not be entitled to what this order gives him. The counter-claim for this purpose is only like a set-off. If a plaintiff succeeds on the issue on a defence of set-off, the event is in his favour. It has been held that when there is a substantial counter-claim, though the claim is admitted, the plaintiff cannot get judgment for it before going to trial: *Mersey Steamship Company* v. *Shuttleworth.* (1)

A. G. M. McIntyre, for the defendant. The order of the learned judge was only to the same effect as the provisions of Order LXV., r. 1, as applied to this case, and does not vary the position of the parties from what it would have been without such order. The plaintiff on the pleadings was entitled to judgment for the amount of his claim, and was only entitled to the costs down to the filing of the counter-claim.

[LORD ESHER, M.R. But how was the plaintiff to get his money?]

The event was in favour of the defendant upon the only issues raised at the trial.

[LORD ESHER, M.R. Not so far as the balance of the claim is concerned.]

He cited *Baines* v. *Bromley.* (2)

Willis, Q.C., was not called on to reply.

LORD ESHER, M.R. In this case the question arises whether the judge had any jurisdiction to make this order with regard to the costs. He could have no jurisdiction to interfere with the costs on the ground that the verdict was wrong. (3) For this purpose the verdict must be assumed to be right. It seems to

(1) 11 Q. B. D. 531.
(2) 6 Q. B. D. 691.
(3) It was suggested in argument that the verdict was the result of a compromise and unsatisfactory.

me therefore that there was no good cause why the judge should order that the costs should not follow the event. It was argued that the order was inoperative, because the costs would go under it in the same way as they would have done if it had not been made. I do not think that that is so. I think it would prevent the master from taxing the costs in the way in which it has been laid down in *Baines* v. *Bromley* (1) that they ought to be taxed in such a case. Therefore the order is not inoperative: and, as I have said, I think there was no jurisdiction to make it. For these reasons I think the appeal must be allowed.

LINDLEY, L.J. I agree. If I could have seen any way in which the plaintiff could have got the balance of his claim without going to trial it is possible I might have taken a different view. I think the learned judge must somehow have proceeded on the supposition that the plaintiff could have got his 60*l.* without going to trial.

LOPES, L.J. It seems to me clear that the judge has by his order prevented the costs from following the event according to Order LXV., r. 1. The judge has no jurisdiction to do that except for good cause shewn. The question, therefore, is whether there was any good cause here. It does not seem that there was. The result is that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Bolton, Robbins, Busk & Co., for C. Hicks.*

Solicitors for defendant: *Freshfields & Williams.*

(1) 6 Q. B. D. 691.

E. L.

1887

July 15, 20.

COLQUHOUN, APPELLANT; BROOKS, RESPONDENT.

Income Tax—Business carried on solely in Australia—Partner residing in England—Liability of such Partner in respect of his Share of Profits not remitted to him in England—5 & 6 Vict. c. 35, ss. 100, 106, 108—16 & 17 Vict. c. 34, s. 2, Sched. D.

The respondent, who resided wholly in England, was a partner in a firm carrying on business solely in Melbourne, Australia. Large profits were made by the firm, and a portion of the respondent's share of the profits was remitted to him in England, which portion was duly returned by him for assessment to the income tax under Schedule D. The larger portion of his share of the profits of the firm was never remitted to him in England, but was left in Australia, and never at any time formed part of the income of this country. The appellant contended that the respondent was liable in respect of the whole of his share of the profits, whether received by him in England or not:—

Held, by Stephen, J. (dissentiente Wills, J.), that the respondent was liable in respect of the whole of his share as being profits or gains arising or accruing to a person residing in the United Kingdom from a trade carried on in the United Kingdom or elsewhere, within the meaning of 16 & 17 Vict. c. 34, s. 2, Sched. D.

By Wills, J. The profits of the Melbourne firm were "foreign" as distinguished from "British" property, and as such were not liable to the operation of the Income Tax Acts until they were received in this country.

CASE stated under 43 & 44 Vict. c. 19, s. 59, by Commissioners of Income Tax.

In this case Mr. Henry Brooks, being dissatisfied with an assessment to the income tax made upon him, appealed to the Income Tax Commissioners for the city of London. The Commissioners having reduced the assessment, were required by the surveyor of taxes to state a case under 43 & 44 Vict. c. 19, s. 59, for the opinion of the Queen's Bench Division, in which the surveyor of taxes was the appellant and Mr. Brooks the respondent.

The case is in substance as follows:—

Mr. Henry Brooks (who is throughout this report called the respondent) appealed against the sum of 9219*l.*, being part of an assessment of 20,513*l.* under Schedule D. to the Act 16 & 17 Vict. c. 34, for the year ending April 5, 1885, under the following circumstances:—

The respondent, who resides solely in England and is a partner in Henry Brooks & Co., of No. 70, Bishopgate Street Within,

merchants, duly made his return for the said firm for income tax in respect of the profits or gains of his said trade on an average of three years at the sum of 8294*l.*, and was assessed on the said sum and duly paid the tax thereon. The respondent returned and paid tax in addition thereto on a sum of 3000*l.* received by him in respect of a remittance from Australia under the following circumstances:—

The respondent is also a partner in the firm of Brooks, Robinson, & Co., of Melbourne, Australia. The two businesses are entirely distinct. The respondent has a large capital invested in the business of Brooks, Robinson, & Co.

Various sums of money have from year to year been remitted to the respondent in respect of his interest in the Australian firm which he has duly returned for assessment, and the said sum of 3000*l.* represented the entire sum received by him during the financial year ending April 5, 1884.

The amount standing to the credit of the respondent in the books of the firm of Brooks, Robinson, & Co. as representing the estimated profits due to him for the year ending April 5, 1885, would if realized amount to the sum of 9219*l.* in addition to the said sum of 3000*l.*

This sum of 9219*l.* was arrived at by an estimate and valuation on taking of stock on a certain fixed day after deducting therefrom the estimate and valuation of the preceding year, but as a matter of fact only a portion of the amount had been actually realized.

Of the sum of 9219*l.* the sum of 429*l.* was the share of interest due to the respondent from a deposit of a capital sum with certain colonial banks in Australia. (1)

No portion of the sum of 9219*l.* had been received in England or had at any time formed part of the income of this country.

The surveyor of taxes contended that the respondent should be assessed not only on the sum of 3000*l.* remitted from Australia as aforesaid, but also on his estimated profits of the firm of Brooks, Robinson, & Co., of Melbourne, amounting to 9219*l.* as aforesaid, and that he should make his return and be assessed under case 1,

(1) It was admitted during the argument that the respondent was not liable to pay income tax upon this sum of 429*l.*

1887

COLQUHOUN v. BROOKS.

rules 1, 2, 3, and 4 to Schedule D. to the Act 5 & 6 Vict. c. 35, and that duty be paid on the same thereunder.

The respondent contended that those provisions were not intended and did not apply to the assessment for income tax on such an interest as he had in the firm of Brooks, Robinson, & Co., and applied only to cases where a trade was conducted either in the United Kingdom or elsewhere by the person assessed, and that the details of the said rules providing for the taking of an average of profits of trade, the various deductions to be allowed or disallowed in respect of repairs, depreciation of machinery, trade plant, house rent, interest of capital, &c., shewed that the said rules were inapplicable to his case. He contended that he was only liable to be assessed on such sums as came home to him and were received in England, and that the income arising from his money interest in the said firm of Brooks, Robinson, & Co. was in the nature of income from securities, and further thereon contended that the said income should be charged under the 4th case, or in the alternative under the 5th case of 5 & 6 Vict. c. 35. He further referred to 5 & 6 Vict. c. 35, 4th and 5th cases, also ss. 106–108; s. 29, 5 & 6 Vict. c. 80; s. 2, 16 & 17 Vict. c. 34; ss. 5 and 10, 24 & 25 Vict. c. 91, all of which sections provided for the assessment and payment of income tax from trade at the place where such trade was carried on, but in cases where the income arises abroad, only on its arrival in Great Britain.

The Commissioners of Taxes were of opinion that the assessment should be confined to such sums as were from time to time received by the respondent in Great Britain and allowed his appeal accordingly, and reduced the assessment to 11,294*l.*

The question for the opinion of the Court was whether the respondent was liable to be assessed upon the said sum of 9219*l.* or any part thereof. (1)

(1) By Schedule D. of 16 & 17 Vict. c. 34, s. 2, duties are imposed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains. . . . ."

By s. 5 of 16 & 17 Vict. c. 34, the

July 15. *Sir E. Clarke, Q.C., S.G.*, and *Dicey*, for the appellant. The language of Schedule D in s. 2 of the Act of 1853 is clear, and the respondent is taxable in respect of the annual profits or gains accruing to him from his trade, whether carried on in the United Kingdom or elsewhere. There is nothing to take this case out of the section merely because the respondent spends these profits in Australia or invests them in his business out there, or otherwise deals with them in that country. The case is concluded by *Cesena Sulphur Co.* v. *Nicholson* (1) and *Calcutta Jute Mills Co.* v. *Nicholson* (2), where companies which carried on their business abroad and had no property in the United Kingdom were held liable to pay income tax upon the whole of their profits, and not merely upon such portion as was sent to and received in the United Kingdom for the benefit of the shareholders residing there.

They also cited *Imperial Continental Gas Association* v. *Nicholson.* (3)

Charles, Q.C. (*Jeune* with him), for the respondent. This is an attempt to tax the share of profits of a partner residing in England, where the partnership trade is carried on exclusively abroad, and no profits are made in England. The business is a foreign business, and the respondent is not liable to pay income tax on the profits of that business not received by him in England. The cases of *Cesena Sulphur Co.* v. *Nicholson* (1), and *Calcutta Jute Mills Co.* v. *Nicholson* (2), are wholly different; they were cases of English companies having a registered office in England, and to a great extent controlled by the directors in this country; the cardinal distinction in the present case is that the business is wholly carried on in Melbourne, without interference or direction on the part of anyone in this country. The whole scheme of the Income Tax Acts is to tax the profits of trade carried on wholly or in part in England, and a trade carried on wholly abroad is not within the Acts at all, although the profits which come here as

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duties thereby imposed are directed to be assessed under the regulations and provisions of 5 & 6 Vict. c. 35.

The duties granted by 16 & 17 Vict. c. 34, have been continued from year to year at various rates by a series of subsequent Acts.

(1) 1 Ex. D. 428.

(2) 1 Ex. D. 428.

(3) 37 L. T. 717.

1887

COLQUHOUN v. BROOKS.

the share of the individual partner are taxable: *Sulley* v. *Attorney General.* (1) Sect. 5 of 16 & 17 Vict. c. 34, provides that the duties thereby granted shall be assessed under the regulations and provisions of 5 & 6 Vict. c. 35; that Act gives in s. 100 the rules relating to assessments under Schedule D., but it contains no machinery for taxing a business wholly foreign. The rules and regulations in ss. 100, 106, and 108 of 5 & 6 Vict. c. 35, limit the application of the very general language of Schedule D., and the plain inference from them is that profits of a business carried on abroad are only chargeable with income tax if, and so far as, they are sent over to this country; and s. 108 applies in terms to profits arising from possessions or securities in the colonies. It is admitted that the respondent is not taxable in respect of the 429*l.* for interest on deposits which has not been sent to him in this country, and he is equally not liable in respect of an uncertain share of his profits in a foreign business.

Dicey, in reply. The Income Tax Acts consist of two parts: the taxing schedules and the machinery provisions. Where, as in this case, the words of the taxing schedule are clear, they require no interpretation from decided cases; their exact ordinary meaning must be given to them, and exemptions are not to be introduced in cases where no exemption totidem verbis is to be found in the Act; for such exemptions are to be found in all cases where it is intended to limit or cut down the ordinary meaning of Schedule D. *Sulley* v. *Attorney-General* (1) is not in point; it only decides that the business of the firm was carried on in America, that the profits were made there, and that it was a foreign firm; and the attempt to charge them with the whole of their gains wherever made therefore failed. The present case is not distinguishable in principle from those of *Cesena Sulphur Co.* v. *Nicholson* (2), and *Calcutta Jute Mills Co.* v. *Nicholson.* (3)

Cur. adv. vult.

July 20. WILLS, J. The question to be decided is whether a person resident in this country, a member of a firm which carries on business exclusively in the colony of Victoria, is liable to be

(1) 5 H. & N. 711.

(2) 1 Ex. D. 428.

(3) 1 Ex. D. 428.

assessed to the income tax in respect of the whole of his share of the profits of that business, or only of such portion thereof as he actually receives in this country. The duty is payable under the provisions of 16 & 17 Vict. c. 34, s. 2, Schedule D, which is in the following words: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged on every twenty shillings of the annual amount of such profits and gains."

The duties granted under the provisions of 16 & 17 Vict. c. 34, are, by s. 5, to be assessed, raised, levied, and collected under the regulations and provisions of 5 & 6 Vict. c. 35, which had its own Schedule D., substantially the same as that of 16 & 17 Vict. c. 34. It is contended for the Crown that the words by which the duty is granted are explicit and free from ambiguity, and amply large enough to cover the present demand. It is contended on behalf of the respondent that the provisions of the Act of 5 & 6 Vict. c. 35, applicable to Schedule D., and especially those contained in ss. 100, 106, and 108, shew that the very general words of Schedule D. must receive some limitation, and that the limitation inferred from those sections is that the duty is chargeable only on the amounts received in this country from the business carried on abroad by the person charged.

It could not be denied that the generality of the words in the first half of the sentence in Schedule D. under consideration is cut down by the enactments referred to, which specifically enact that the computation of profits on securities and possessions out of the United Kingdom shall be made upon the amount received in this country—receipts for the assessment and charging of which appropriate machinery is there provided—and unless a suggestion made by Mr. Dicey, but hardly seriously insisted on, be adopted, viz. that s. 6 of 16 & 17 Vict. c. 34 (which enacts that nothing in the two Acts shall be construed to exempt any person resident

1887

COLQUHOUN v. BROOKS.

Wills, J.

in any part of the United Kingdom from the duties in respect of the profits received from possessions or securities abroad) made persons taxable liable to duties beyond those upon the profits of such possessions or securities received in the United Kingdom, it is clear that in respect of the profits of foreign or colonial securities and possessions, a person resident in this country is liable only in respect of the amounts he receives in this country. Mr. Dicey's contention would involve the extravagant consequence that a person who had returned and paid income tax upon the whole of his receipts, according to which the Act says that his duty is to be computed, might still be liable to a penalty of £50, and treble duty, for not returning the amount of such profits *not* remitted to this country. But it was urgently pressed upon us for the Crown that the very fact that the Act of Parliament does, in the case of profits from securities and possessions abroad, limit the computation to what is received in the United Kingdom, but contains no express reference to such a limitation in case of the profits of a trade carried on abroad, was a reason for supposing that the limitation was not intended to exist in the latter case.

I may observe that the method of construction summarised in the maxim "Expressio unius exclusio alterius" is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the "expressio" complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind; and the application of this and every other technical rule of construction varies so much under differing circumstances, and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant. Certainly in the present case the only use of the maxim in question is to summarise in four words the argument upon this point for the Crown.

It seems to me that an inquiry of a much more important kind, and one which bears very closely upon the present question, is whether there is any general rule as to the extent to which

1887

COLQUHOUN v. BROOKS.

Wills, J.

English Acts of Parliament dealing with property in general are to be treated as applying to foreign property. I use the word "foreign" as including colonial property, and I mean by it property which, whether situate in England or elsewhere, is not at the time to which the discussion relates English property, as distinguished from foreign or colonial property. It seems to me that there is such authority, and that it runs in a well-defined current. "It is quite clear," says Lord Westbury, "that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property:" *Attorney-General* v. *Campbell.* (1) In that case a subject of the United Kingdom domiciled in Portugal made his will in London and died there. He desired his executors to collect his property in Portugal, to invest a portion of it in the English funds, to pay the income to A. for life, and after A.'s life to divide the fund so invested amongst her children. It was held that though the Portuguese domicil of the testator stamped his property at the time of his death with the quality of foreign property, yet that when the executors had received the money and in pursuance of the trusts brought it to this country and invested it here, it became British property, and so upon the death of A. succession duty was payable. Nothing can be more general than the terms in the Succession Duty Act (16 & 17 Vict. c. 51), s. 2, by which the word "succession" is defined and the liability imposed, and the duties are imposed "in respect of every succession" (s. 10), just as here they are imposed "for and in respect of profits or gains"; "but," says Lord Westbury, Lord Hatherley, Lord Chelmsford, and Lord Colonsay agreeing, "it is quite clear that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property; but, after the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property, and is no longer to be dealt with as if it were merely a portion of a foreign testator's estate to be received in the course of administration."

There was an earlier decision on this subject by Lord Cranworth,

(1) Law Rep. 5 H. L. 524, 530.

1887

COLQUHOUN v. BROOKS.

Wills, J.

when Lord Chancellor, in *Wallace* v. *Attorney-General* (1), in which it was held that the words of the Succession Duty Act, upon the ample character of which much the same arguments were founded as have been addressed to us in the present case, had no application to money in the English funds held by an Englishman domiciled in France at the time of his death. The Lord Chancellor expressed himself as follows: "The ground on which my opinion rests is that to the generality of the words in the 2nd section under which a duty is imposed upon every person who becomes entitled to property on the death of another some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country." Lord Westbury explains that this language had misled the Master of the Rolls, whose decision in this case was overruled by the House of Lords, and who had considered that, as the Portuguese testator's will was a foreign one, the beneficiaries became entitled by virtue of the law of Portugal and not of British law, and therefore that the succession duty was not payable. Lord Westbury, having pointed this out, proceeds to explain that it is according as the property at the time of the succession is English or foreign that the Act of Parliament imposing the duty does or does not apply.

There are similar decisions as to the Legacy Duty Acts. The words of 55 Geo. 3, c. 184, Sched. Part 3, are perfectly general as to legacies: "for every legacy given by any will of any person who died before or upon the 5th day of April, 1805"; but it was held by the House of Lords in *Thomson* v. *Advocate-General* (2) that personal property in Scotland bequeathed by a testator domiciled in Demerara was not liable to legacy duty; and in applying that case to personal property in India bequeathed by a person domiciled in England, the Court of Exchequer explained that the legacy duty was imposed only upon property in England. "The English statute," says Parke, B., "not applying to property in India, the property" (in the case of *Attorney-General* v. *Jackson* (3)) "was exempt from legacy duty"; and then

(1) Law Rep. 1 Ch. 1. (2) 12 Cl. & F. 1.
(3) 2 Cl. & F. 48.

the Court go on to decide that the property then in question, though locally situate in India, was in contemplation of law in England, and upon that ground that it was liable to legacy duty: *Attorney-General* v. *Napier*. (1)

Much criticism has been passed, and there seems to be just ground for it, on the fact that different explanations have from time to time and in various cases been given of the reasons why property is or is not subject to legacy or succession duty. The matter is discussed with his usual clearness and ability in a passage of Mr. Dicey's very interesting work on Domicil, at p. 318 of the first edition. The differences, however, seem to me not to touch the essential principle, which is that the property to be operated upon must be British property. As to why it is or is not to be regarded as British property in particular cases different reasons may well be given; but the question in every instance seems to me to be one of fact; "Is the property sought to be affected British property or not?" Mr. Dicey treats the case of *In re Cigala's Settlement Trusts* (2) as laying down a different test, and refers to it at p. 362 as having gone further than any other in cutting down the application of the rule that the domicil of the testator settles the question. But the domicil of the testator, in my opinion, settled the question, where it did so, only because in those cases it was the guiding and predominant fact tending to shew that the property in question was British. There may be other facts which deprive it of its effect if it stands alone or unqualified, and which justify the tribunal, notwithstanding the foreign domicil of the testator or settlor, in coming to the conclusion that the subject of legacy or succession was British property. In the case of *In re Cigala's Settlement Trusts* (2) just referred to the property in question was the subject of a settlement made on the marriage of an English lady with an Italian. In the course of the argument Jessel, M.R., said, "This is personal property in the hands of English trustees, and you cannot get it from them except by an action in England. That is the true test; in order to recover the property you must come to England." This does not mean that that is taxable which would not otherwise be so, because the person entitled

(1) 6 Ex. 217 (2) 7 Ch. D. 351.

1887

COLQUHOUN v. BROOKS.

Wills, J.

wants the help of our Courts to get him his due; a view of our jurisprudence which would be anything but complimentary or agreeable; but what is meant is, that the circumstance that if the trustee improperly withheld the fund and the beneficiary had to resort to a Court to do him justice, a British Court is the only one competent to give him redress is a cogent, if not conclusive, circumstance to shew that the property is really British. The summary with which the judgment closes emphasises this view. The Master of the Rolls says, "The settlement then, being a British settlement, the trustees being subject to British jurisdiction, the forum for deciding the claim being a British Court, and the property being in fact English property, it appears to me that this is property coming within the 2nd section of the Act," and therefore liable to duty. It seems to me, therefore, that the question here is whether the profits and gains of the Melbourne House, before any part of them is transmitted here, constitute British property. If they do, they fall within the Act, for they "accrue to the respondent from trade carried on in the United Kingdom or elsewhere." If they do not, they are not touched by the Act, and therefore are not liable.

How this question should be answered appears to me to be absolutely free from doubt. We do not know what is the domicil of the respondent, but it is admitted on all hands that domicil has nothing to do with the present question, and it seems to me that there is absolutely nothing to give a British character to the unremitted portion of the profits made in Melbourne by a business carried on in the colony of Victoria only.

It would be sufficient, in my opinion, to stop here. But it is worth while to point out that the Act not only provides no machinery for the assessment on the profits of his trade of one partner apart from the rest, but prohibits such separate assessment save in cases where one of the partners can claim exemption on the ground of the smallness of his income, for which specific provisions are made (see s. 100, rules applying to cases 1 and 2). The assessment must be that of the firm, and the assessment of the firm is to charge the partners jointly. If the profits of the foreign business therefore had been assessable at all, as profits, the Court of Exchequer would have been well justified in holding,

as they did in *Attorney-General* v. *Sulley* (1), that a partner resident in England, one of a firm carrying on business abroad, was bound to make a return of the whole of the profits of the foreign firm in which he was a partner. This was their decision. It involved no doubt the consequence that he was liable to pay income tax upon the whole of the profits of the foreign business. If those profits were a subject of assessment at all, it would be he who must make the return. The return would then be, in the language of the Act, "sufficient authority to charge the partners jointly," and the others being abroad he could be proceeded against alone for the whole sum. The question for decision in the case, however, was only as to his liability to make a return of the whole of the profits of the business. This judgment was reversed by the Court of Exchequer Chamber. (2) Much of the judgment is devoted to the question of where the business was carried on. This is a necessary inquiry, for although the Act says the duty shall be payable upon the profits of a business, "whether the business be carried on in the United Kingdom *or elsewhere*," and although profits made abroad *may* be English property, yet the first step towards shewing that they are not English property will generally be to shew that the business itself is not carried on in this country. The judgment lays down in conclusion that "the profits which come home to this country as the share of the individual partner resident here are taxable: the profits which go into the pockets of the partners in America are not." No distinction was material in that case between a portion and the whole of the profits of the partner resident here. Obviously the Lord Chief Justice assumed that the partner resident here would have the whole of his share of the profits remitted, and I think it sufficiently appears from the report that this was in fact the case. The information charged the defendant with having failed to deliver to the Commissioners a statement of the profits of his firm or any statement whatever, and claimed treble duty and 50*l.* penalty. A statement appears to have been signed by his counsel admitting his liability to duty on the whole of the profits he received from the business of the firm (3); and it

(1) 4 H. & N. 769. (2) 5 H. & N. 711.

(3) 4 H. & N. 779.

1887

COLQUHOUN v. BROOKS.

Wills, J.

is clear, I think, that they must have been received by him in this country, because in the judgment of the Court of Exchequer it is said that the first part of Schedule D was conclusive upon this point. The first part of Schedule D is by the Act itself specifically limited to the amount actually received in England, so that I think there can be no doubt that he received in England the whole of his share of the profits. The principle of the decision is, therefore, that profits of a business carried on abroad and not in the United Kingdom, profits made abroad and never remitted here, are not taxable; and the decision is in harmony with the view I have expressed and the reasoning by which I have endeavoured to support it. They are not, in the language of Lord Westbury and of Jessel, M.R., "British property." They lack, indeed, every element of British nationality.

The cases of *Cesena Sulphur Company* v. *Nicholson* (1) and *Calcutta Jute Mills* v. *Nicholson* (2) require to be noticed. Each of the companies in question was registered in England and had its chief office and the seat of its government and direction in London, but all the business was carried on, and all the profits earned abroad, and a large portion of them never came home at all, but were distributed in Italy and in India respectively to shareholders resident in those respective countries. It was admitted by the companies that the portion of their profits divided amongst shareholders in England was liable to income tax; but it was contended that the portions which were never remitted home, but were divided in Italy and India respectively, were exempt. The Exchequer Division (Kelly, C.B., and Huddleston, B.), held and, as it seems to me, rightly held, that the companies were each of them "resident" in the United Kingdom, and that the whole of their profits, and not merely the portion actually remitted to and divided in England were liable to income tax. The profits were earned by an English business, and were none the less English profits because the whole of them had not been remitted home and distributed by the directors from England. The greater part of the judgment is occupied with the question whether the companies were "resident" in England. That is only the first stage of the inquiry. When we

(1) 1 Ex. D. 428.

(2) 1 Ex. D. 428.

come to the portion of the judgment which deals with the grounds upon which they were held liable, they are not very definitely stated, and many of the expressions used apply rather to the question where the business was carried on than to the nationality, so to speak, of the profits themselves. That question, however, must almost always be involved in the question whether the profits are British property, and it can hardly have escaped the Court that that is not the test, for the profits, where taxable, are taxable equally, whether the business be carried on in Great Britain or otherwise, and this cannot have been forgotten by the Lord Chief Baron, for he quotes the very words of the statute, and says these are profits arising from a business carried on in the United Kingdom or elsewhere. He therefore cannot have intended to treat the question whether the business was carried on in the United Kingdom or not as the test of liability; but it will very often happen, no doubt, that upon a question of this kind —whether or not the profits are British property, property stamped with a British nationality—the determination of where the business is really carried on pretty nearly gives the answer. If a business be really carried on in London, the profits are not the less English-made profits because many of the operations of trade are carried on abroad, nor because the person carrying on the trade is a foreigner, and in the cases under consideration, England being, as it were, the natural and only home for these profits to come to, the domicil of the business, so to speak, and of all its rights, as apart from the place where they might be exercised, the profits were of English nationality, and were, again, English property.

It is true that the Lord Chief Baron said that one great principle of the law of England is that taxation shall be imposed only on persons or things actually within the country, and that the taxation of the two-thirds of the Cesena company's earnings which belonged to the Italian shareholders was an infringement of one of the principles on which taxation is levied by the laws of every country. It is submitted that the observation is incorrect. The two-thirds of the earnings, so long as they remained undivided, did not belong to the Italian shareholders but to the company. Nothing with relation to the profits, except a right enforcable

1887

COLQUHOUN v. BROOKS.

Wills, J.

in an English Court, belonged either to the Italian shareholders as a body or to any individual shareholder, Italian or English. To such a case the remark of the late Master of the Rolls is applicable; no shareholder could get his share of the earnings from the company—if improperly withheld—except by an action in an English Court. They were, therefore, English property, and the decision in these cases also is in harmony with the principle I have laid down.

It is clear that, so far as the profits derived from foreign or colonial securities or possessions are concerned, the Act itself proceeds upon the same principle. I can conceive no reason why a distinction should have been made in favour of the profits of foreign securities as compared with those of a foreign business, and why the profits of the business should be taxable whether remitted to the partner resident or not, whilst the profits of foreign securities or possessions should escape taxation unless remitted. No ground of principle for such a distinction has been or can be suggested. There is no reason, therefore why the maxim, expressio unius exclusio alterius, should apply; whereas the provisions made in respect of the tax upon the profits of foreign possessions or securities are in strict accordance with what I have shewn to be a recognised principle of English law. It is far easier to suppose that the omission of any special mention of the case of a person resident here and not receiving the whole or part of the profits of a business carried on abroad by a firm of which he is a partner is an accident, than that there should, in respect of an isolated case of this kind be a departure without express words from a well-established principle regulating the application of Acts of Parliament in general and, as has been shewn, repeatedly recognised and acted upon in respect of fiscal statutes.

The provisions relating to the profits of foreign securities are, however, important as pointing out what, for the purposes of this Act, effects the conversion of foreign into British property, and thus renders it liable to taxation, though probably the same conclusion might have been arrived at without their help. The profits of the foreign trade, like the profits of foreign securities, become British property, and as such become liable to the operation of

the Acts of Parliament, when they are received in this country, and not till then.

I am of opinion, therefore, that in this case the respondent is entitled to our judgment.

STEPHEN, J. In this case I have the misfortune to be unable to agree with the judgment of my Brother Wills; I have, however, had the advantage of reading it, and I fully agree with the way in which he has stated the facts of the case and the questions which arise upon them. I also think that the cases which he has referred to contain the grounds upon which the decision of the present case ought to proceed. The difference between us lies in the view which we take of them. I shall thus be enabled by his judgment to state very shortly the grounds on which I have arrived at a different conclusion.

Shortly, my opinion is that the words of Schedule D. cover the facts of the present case, and that the authorities to which my Brother Wills refers do not warrant the restriction which he would put on those words. The relevant words are, "in respect of the annual profits and gains arising or accruing to any person residing in the United Kingdom from any . . . . trade, ... whether the same shall be carried on in the United Kingdom or elsewhere." To this my Brother Wills would add some such words as these, "except such part of those profits and gains as the person entitled thereto may not bring into the United Kingdom." The reasons for adding this exception are, firstly, that in the case of *Attorney General* v. *Campbell* (1), which was decided in 1872, a principle is laid down which is thus expressed by Lord Westbury (at p. 530), "You cannot apply an English Act of Parliament to foreign property whilst it remains foreign property." This principle, it is suggested, would be violated if the proposed exception were not made, because the property in this case is "foreign property." I do not understand the case in the same manner. Lord Westbury's words seem to me to mean by "foreign property" only the property of a person domiciled abroad at the time of his death, and his reference to statutes appears to me to be limited to statutes imposing duties on

(1) Law Rep. 5 H. L. 524.

1887

COLQUHOUN v. BROOKS.

Stephen, J.

property when by the death of its owner it changes hands. To understand the meaning and application of this principle to the case of *Attorney General* v. *Campbell* (1), decided in 1872, it should be read in connection with the earlier cases of *Thomson* v. *Advocate General* (2), decided in 1845, and *Wallace* v. *Attorney General* (3), decided in 1865. My Brother Wills has stated the facts of these cases; I will state the principle which applies to them all as I understand it. It is stated most authentically and forcibly in *Thomson* v. *Advocate General* (2), a case of the highest possible authority, as it was a unanimous decision of the House of Lords, founded upon a unanimous opinion of the judges whom they consulted, and it is as follows:

The personal property of a deceased person is considered by English law as subject to the law of the domicil of the deceased. Therefore the property of a deceased person domiciled in Demerara, though situated in England, is not liable to English legacy duty, but is treated as if it were in Demerara: *Thomson* v. *Advocate General.* (2)

Neither is the property of a deceased person domiciled in France liable to succession duty, though it is situated in England, but is treated as if it were in France; the difference between succession duty and legacy duty being nominal rather than substantial in reference to this matter: *Wallace* v. *Attorney General.* (3)

If, however, such property is by the will of a person domiciled abroad made the subject of an English settlement, the trustees of which are English, and the subject of which is stock in the English funds, and if under the provisions of that settlement persons wherever domiciled receive a benefit on the death of a living person, the cestui que trustent are liable to succession duty because their rights are dependent on English law. A man domiciled in Portugal creates by his will a trust in England to secure his sister an annuity for life, and directs that after her death the moneys appropriated to that purpose shall be distributed amongst his children to whom he had left the rest of his property. On the sister's death the children's shares are chargeable with legacy duty.

(1) Law Rep. 5 H. L. 524. (2) 12 Cl. & F. 1.
(3) Law Rep. 1 Ch. 1.

It was with reference to this doctrine that Lord Westbury stated the principle which I have quoted. It appears to me to have no relation to this case, in which there is no question of domicil. I think that the question of British property and foreign property does not arise in this case at all. The Act is directed to the taxation of persons, not to the distribution or management of things, and I see no reason why an Act which in terms taxes residents in England for the profits of trade carried on abroad should be cut down by implication so as to apply to those parts only of the profits which are brought home. The two cases of *Cesena Sulphur Co.* v. *Nicholson* (1) and *Calcutta Jute Mills Co.* v. *Nicholson* (2) appear to me direct authorities to shew that the Act has the effect contended for by the Crown. In each case the Court held that the company was in the position of a person resident in England, and was as such liable to be taxed upon all its profits, though a large part of those profits was never brought to England at all. In the case of *Attorney General* v. *Sulley* (3) the contention was that the shares of the American partners ought to be returned by the English partners to be taxed here, but the trade was held not to be carried on in this country. It was not disputed that the defendant's share was to be taxed, and it appears to have been assumed that it was sent home to him here. It does not, therefore, touch this case.

With respect to the sections of the Act of 1842, which are referred to in support of the defendant's contention, two remarks will be sufficient. Agreeing with much that is said by my Brother Wills of the maxim about the expression of one thing being the exclusion of others, I think that in this case the mention of a particular way of computing the profits of foreign securities and possessions adds something to the silence of the Act about foreign trade. At all events it makes rather against the defendant than for him. But the really important matter, to my mind, is the language of Schedule D. It is nothing like so general as the language of the Succession Duty Act or the schedule imposing legacy duties. These Acts taken literally would impose duties on all persons being entitled to legacies or

(1) 1 Ex. D. 428. (2) 1 Ex. D. 428.
(3) 4 H. & N. 769; 5 H. & N. 711.

1887

COLQUHOUN v. BROOKS.

Stephen, J.

successions all over the world, and whether British subjects or not, which of course would be absurd. Some limitation being required, the limitation as to domicil was natural. I see no reason for any limitation of the plain words of Schedule D in the present case; language could hardly be more specific. The words are "annual profits arising to any person residing in the United Kingdom from any trade carried on in the United Kingdom or elsewhere." These, with other words which I need not quote, are specific as to the time when and the persons to whom Schedule D. applies, and as to the places where the income referred to is to be made and the person chargeable is to reside, and I do not see what further particulars could be given or are required. I think, therefore, that the appellant is entitled to our judgment.

WILLS, J., having, as the junior judge, withdrawn his judgment in accordance with the old practice in the Court of Exchequer, judgment was entered for the Crown.

Judgment for the appellant.

Solicitor for appellant: *Solicitor for Inland Revenue.*
Solicitors for respondent: *Shepheards.*

W. J. B.

[IN THE COURT OF APPEAL.]

1887
July 8.

STOKES *v.* STOKES.

Practice—Transfer of Action to County Court for Trial—Jurisdiction—Action for Slander—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 67.

Notwithstanding the provisions of s. 67 of the Judicature Act, 1873, which applies the provisions of s. 10 of the County Courts Act, 1867, to "all actions in the High Court in which any relief is sought which can be given in a county court," there is still jurisdiction, under s. 10 of the County Courts Act, 1867, to remit an action for slander to a county court for trial.

Decision of Queen's Bench Division (ante, p. 62) affirmed.

APPEAL by the plaintiff in an action for slander against the affirmance by a Divisional Court (Field and Manisty, JJ.) of the order of Grantham, J., affirming an order made by the Master that, in the event of the plaintiff failing to give security for costs, the action should be remitted for trial before a county court under s. 10 of the County Courts Act, 1867.

The case is reported ante, p. 62.

By the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 58, the county court is not to have cognizance of actions for slander.

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 10, power is given to the court or a judge in actions in the superior courts "for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other actions of tort," where the plaintiff has no visible means of paying costs, to make an order that, unless the plaintiff give security for costs, or shew that he has a cause of action fit to be prosecuted in the Superior Court, the cause be remitted for trial before a county court, which "shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court."

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 67, "The provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act, 1867, shall apply to all actions commenced

1887

STOKES v. STOKES.

or pending in the said High Court of Justice in which any relief is sought which can be given in a county court."

Cock, Q.C., and *C. G. Ellis*, for the plaintiff. The effect of s. 67 of the Judicature Act, 1873, is to limit and restrict the power of remitting actions to a county court for trial, which is given by s. 10 of the Act of 1867, to actions "in which any relief is sought which can be given by a county court." An action of slander is not such an action; it is expressly excluded from the cognizance of a county court by s. 58 of the Act of 1846. The words above quoted do not apply to an action which could only be tried in a county court by virtue of s. 10 of the Act of 1867. Sect. 10 of the Act of 1867 is impliedly repealed as regards actions for malicious prosecution, libel, slander, and seduction, because, as regards those actions, s. 10 is inconsistent with s. 67 of the Act of 1873. In *Garnett* v. *Bradley* (1) it was held that s. 5 of the County Courts Act of 1867 was impliedly repealed by the Judicature Act of 1873, and the same principle applies to s. 10 of the Act of 1867. In *Garnett* v. *Bradley* (2) Lord Blackburn, speaking of s. 67, said: "That enactment, therefore, does not touch the cases in which a county court cannot give relief; and still, notwithstanding all that has been done, a county court cannot entertain an action for slander." The words of s. 67 would have no meaning unless they restrict the operation of those sections of the Act of 1867 which are mentioned.

Rose-Innes, for the defendant, was not heard.

LORD ESHER, M.R. The decision in *Garnett* v. *Bradley* (1) has no application to the present case. That decision related to a question about costs, which depended upon whether the provisions of Order LV. of the Rules of Court of 1875 were inconsistent with the prior legislation as to costs contained in the Act 21 Jac. 1, c. 16. The House of Lords held that the two provisions were inconsistent, and that, therefore, according to a well-known rule, the later legislation had by implication repealed the earlier enactment. That rule existed long before *Garnett* v. *Bradley* (1), and the only question was whether the two enact-

(1) 3 App. Cas. 944. (2) 3 App. Cas., at p. 971.

ments were inconsistent with each other. That decision can be no authority for determining whether two different enactments are inconsistent with each other. Moreover, in my opinion, the observations of Lord Blackburn which have been quoted have nothing to do with the present question. He was then considering the question whether an action for slander could be "entertained" by a county court—that is, brought in a county court as a county court action. No one asserts that it can; the question is whether such an action, when it has been brought in the High Court, can be remitted to a county court for trial. The question is whether the two enactments—s. 10 of the Act of 1867 and s. 67 of the Act of 1873—are so inconsistent that it must necessarily be held that the second has repealed the first. If s. 10 has not been repealed, the present case is clearly within it. Now s. 10 is not dealing with the jurisdiction of county courts as such, but it gives the judges of the High Court power in certain cases to use the county courts as their instruments—power to send certain classes of actions, when they have been commenced in the High Court, to be tried in the county court. In such a case, when the action is tried in the county court, the judgment is carried out as the judgment of the High Court. What, then, does s. 67 of the Judicature Act do? It says that the provisions contained in certain sections of the County Court Act, 1867, including s. 10, which gives power to send actions to be tried in a county court, are to apply "to all actions in the High Court in which any relief is sought which can be given in a county court." If the words, "all actions in the High Court," had stood alone, every action commenced in the High Court could have been sent to be tried in a county court. The legislature did not intend that, and therefore they have limited those words by adding "in which any relief is sought which can be given in a county court." Those words are intended to limit the word "all." Sect. 10 is intended to remain in force in all the cases which are mentioned in it, and it is intended to apply also to all other actions "in which any relief is sought which can be given in a county court." It adds those cases to the list of cases which is given in s. 10, and it does not limit the operation of s. 10. The two sections are in no way inconsistent,

1887

STOKES v. STOKES.

and the later one does not repeal the earlier. Sect. 67 of the Judicature Act does not apply to the present case, but it is governed by s. 10 of the County Courts Act, 1867.

LINDLEY, L.J. I am of the same opinion, and I have very little to add. It would be strange if it had been now discovered for the first time that there has been a misconception as to the power of the High Court to remit actions of this kind for trial by a county court. Sect. 67 of the Judicature Act applies s. 10 of the County Courts Act to "all actions commenced or pending in the High Court in which any relief is sought which can be given in a county court." A doubt was felt whether s. 10 would work at all when the new tribunal, called the High Court of Justice, was created. Sect. 67 is very wide in its terms; it says "all actions." Sect. 100 defines the meaning of the word "action." Sect. 67 is an enlarging, not a restricting, section. The latter words, "in which any relief is sought which can be given in a county court," restrict the meaning of the word "all," and do not apply to the particular classes of actions which are mentioned in s. 10. To say that s. 67 deprives the Court of a power which it had under s. 10 would be to misapprehend its operation altogether; its operation is to extend, not to limit, the power conferred by s. 10.

LOPES, L.J. In my opinion s. 67 of the Judicature Act has not repealed s. 10 of the County Courts Act of 1867. An earlier enactment may be repealed either by the express words of a later enactment or by necessary implication. It has not been suggested that there are any words in s. 67 which expressly repeal s. 10, and, in my opinion, it is not repealed by implication. In order that an enactment may be repealed by implication there must be something in the later enactment so inconsistent with the earlier as to lead to the necessary conclusion that the two could not have been intended to stand together. I do not think that there is any inconsistency between the provisions of s. 67 and those of s. 10. On the contrary, it appears to me that the object of s. 67 was to preserve s. 10, but at the same time to extend and enlarge its operation—to apply the power conferred by it "to all

actions in the High Court in which any relief is sought which can be given in a county court," instead of its being limited to those particular cases which are mentioned in s. 10. I am of opinion that the decision of the Divisional Court was right.

Solicitor for plaintiff: *R. Chapman.*

Solicitors for defendant: *Lumley & Lumley.*

W. L. C.

BADDELEY *v.* EARL GRANVILLE.

July 12.

Master and Servant—Breach of Statutory duty—Volenti non fit injuria—Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 1, *sub-s.* 2—*Coal Mines Regulation Act*, 1872 (35 *&* 36 *Vict. c.* 76).

The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine under s. 52 of the Coal Mines Regulation Act, 1872, required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880:—

Held, that the defence arising from the maxim volenti non fit injuria was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover.

Thomas v. *Quartermaine* (18 Q. B. D. 685) discussed.

APPEAL from the Hanley County Court of Staffordshire.

The action was under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 2, and was brought to recover damages for the death of the plaintiff's husband, which happened under the following circumstances:—

The defendant was a colliery owner, and special rules for the management of his collieries were established under s. 52 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), which provides that "there shall be established in every mine to which this Act applies such rules (referred to in this Act as special rules) for the conduct and guidance of the persons in the management of such mine or employed in or about the same as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in

1887

BADDELEY v. EARL GRANVILLE.

or about the mine, and such special rules, when established, shall be . . . . observed in and about every such mine, in the same manner as if they were enacted in this Act." One of the special rules required a banksman to be constantly present at the pit's mouth when the men were going up or down the shaft. It was, however, the regular practice of the mine that no banksman should be in attendance during the night, and of this practice the deceased, who worked in the colliery, was fully aware. While the deceased was coming out of the shaft at night, no banksman being present, an accident happened owing to a signal to lower the cage being improperly given to the engineman by a boy of fourteen years of age, who took upon himself to interfere and to give the signal; from the effects of this accident the deceased died on the following day.

The county court judge, being of opinion that the negligence of the certified manager of the mine in systematically allowing the rule to be broken was the proximate cause of the accident, gave a verdict and judgment for the plaintiff for 120*l*. The defendant appealed.

Upon the argument of the appeal three points were taken on behalf of the defendant: 1st, that the county court judge misread the rule in assuming that it imposed upon the defendant an absolute obligation to have a banksman at the surface at all times during the progress of the cage up or down the shaft; 2nd, that the negligence of the manager in allowing the banksman to be absent during the night was not the proximate cause of the accident, which was due to the improper interference of the boy; and 3rd, that, as the deceased performed his duties with a full knowledge of the practice of the mine, he voluntarily incurred the risk, and the maxim volenti non fit injuria was therefore an answer to the action. All the points were decided in the plaintiff's favour, but the case is only reported on the last point.

Aspland, Q.C. (*G. E. Tyrrell* with him), for the defendant. The plaintiff was fully aware of the practice of the mine, and voluntarily undertook the risk; the maxim volenti non fit injuria therefore affords a good defence to the action. The distinction

between the breach of a statutory duty and of a duty at common law cannot be maintained, as was pointed out by the Master of the Rolls in *Thomas* v. *Quartermaine* (1), which is not distinguishable from the present case. It is true that in *Clarke* v. *Holmes* (2) there was a breach by the defendant of a statutory duty to fence machinery, but the decision proceeded upon the ground that the workman had called the master's attention to the defect, that a remedy had been promised, and that the servant had gone on working under such promise, and upon the further ground that, apart from any question of statutory obligation, there was a duty at common law upon the master to fence, and that a breach of that duty was negligence for which he was responsible. *Wilson* v. *Merry* (3) is a direct authority in the defendant's favour.

C. A. Russell, for the plaintiff. The distinction between a common law duty and one imposed by statute is well-established, and is recognised both by Bowen, L.J., and Fry, L.J., in *Thomas* v. *Quartermaine.* (1) It is possible that the deceased might not have been able to bring an action for wages lost by him if he had not gone down the pit owing to the banksman's absence; but it is unnecessary to shew that he had such a right of independent action for the breach of duty before he can acquire a right to sue in respect of the negligence.

Aspland, Q.C., in reply.

WILLS, J. The question raised in this case is one of some difficulty. The recent decision of *Thomas* v. *Quartermaine* (1) has established the doctrine that, in cases where primâ facie an action lies under the Employers' Liability Act, an answer is supplied if the servant voluntarily took on himself the risks which proved fatal. That decision is one of which we have not heard the last; it has opened up a new field of inquiry and a new domain of litigation in this class of cases. Like all cases where general words of wide application are used it has given rise, and will continue to give rise, to much discussion. It must not be supposed that in saying this I have the slightest intention of

(1) 18 Q. B. D. 685. (2) 7 H. & N. 937.
(3) Law Rep. 1 Sc. App. 326.

1887

BADDELEY v. EARL GRANVILLE.

WILLS, J.

speaking disparagingly of that decision, or that I express anything but my sense that a class of questions difficult of determination will arise from it.

I do not attempt to frame any general rule; the circumstances of each case vary immensely, and my remarks are confined to those of this particular case. Nor do I in any way discuss the general meaning of, or the limitations which should be imposed upon, the maxim of volenti non fit injuria; I only say that its application will require to be watched with great care. Assuming it to be generally applicable in the widest sense, it is sufficient to say that in *Thomas* v. *Quartermaine* (1) both the Lords Justices thought that the maxim would not apply at all where the injury arose from a direct breach by the defendant of a statutory obligation. I agree with the suggestion of Mr. Russell that the remarks of Bowen, L.J., on this point were not made in any casual manner. It is true indeed that the Master of the Rolls expressed a different opinion, and that the observations were unnecessary for the decision of that particular case, but we have the deliberately expressed opinion of two of the judges of the Court of Appeal, to which, though not strictly binding upon us, I should be in any case disposed to pay the greatest respect, and with which I in fact agree. There is, besides, much to be said on public grounds in favour of it. An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation people may come to what agreements they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of volenti non fit injuria is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard

(1) 18 Q. B. D. 685.

of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to. On that ground there is much to be said in favour of the opinion expressed in the Court of Appeal that where there has been a breach by a defendant of a statutory obligation the maxim volenti non fit injuria has no application.

Mr. Russell took a narrower and finer point, and argued that before applying the maxim volenti fit non injuria to an action of this kind it must be shewn not merely that the servant knew that the cage would travel up and down without the attendance of a banksman, but also that he knew that the necessity for the presence of a banksman was provided for by the colliery rules, as otherwise the servant would not be "volens" that he should be deprived of the protection to which he has a right conferred by statute. It is not shewn in the present case that the rules were brought to the notice of the deceased, and an essential link in the evidence appears to me to be wanting. I do not however decide the case on this ground, nor do I wish it to be supposed that I mistrust what I have before said as to the applicability of the legal maxim.

GRANTHAM, J. I am of the same opinion. It is argued here that the plaintiff cannot recover because of the decision in *Thomas* v. *Quartermaine* (1), but we are precluded from taking that view by the peculiar character of that case. It is admitted that but for that decision the present defendant would be liable; but then both the Lords Justices in *Thomas* v. *Quartermaine* (1) say that their decision is not to apply to a case like the present. How then can the defendant rely on the decision in that case when the learned judges in the Court of Appeal say that it is not to apply to cases where there is a statutory obligation imposed on the defendant? The application of that decision seems to me to be intentionally limited by the Court to the case before it. If that is so, the Lords Justices agree with the Master of the Rolls that the defendant would be liable in such a case as the present. I think that *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (2) is

(1) 18 Q. B. D. 685. (2) Law Rep. 8 Ex. 283.

1887

BADDELEY v. EARL GRANVILLE.

Grantham, J.

very much in point. It was there held that a breach by the defendants of a statutory obligation to have a communication between the guard of a train and the passengers was evidence against them in an action of negligence, although the non-compliance with the statutory obligation was not the proximate cause of the accident. I am clearly of opinion therefore that where there has been a distinct breach of a statutory obligation (the obligation in the present case being to have a banksman continually watching during the progress of the men up and down the shaft) the case of *Thomas* v. *Quartermaine* (1) is no authority; and the verdict and judgment for the plaintiff in the county court must be upheld.

Appeal dismissed.

Solicitors for plaintiff: *Wedlake, Letts, & Wedlake.*
Solicitor for defendant: *H. R. Tyrrell.*

W. J. B.

June 16.

SCOVELL AND ANOTHER *v.* BEVAN.

County Court—Jurisdiction—Admiralty Causes—Collision—Actions under 50*l.* *—County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3, 5.

The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), does not deprive county courts not having Admiralty jurisdiction of their original jurisdiction to try actions to recover damages for injuries caused by collision between vessels where the amount claimed does not exceed 50*l.*

APPEAL by the defendant from Huddleston, B., at chambers, refusing to order a writ of prohibition to issue to the judge of the Southwark County Court and to the plaintiffs in the action to prohibit them from proceeding to a trial of the action.

The action was brought to recover 5*l.* 17*s.* for damages caused to a barge of the plaintiffs on the river Thames through a collision arising from the alleged negligent navigation of a barge of the defendant. The defendant applied at chambers for a prohibition to prevent the trial of the cause in the Southwark County Court, on the ground that it was an Admiralty cause within the meaning of s. 3 of the County Courts Admiralty Jurisdiction

(1) 18 Q. B. D. 685.

Act, 1868 (31 & 32 Vict. c. 71). (1) Admiralty jurisdiction over the district of the Southwark County Court is, by Order in Council made under 31 & 32 Vict. c. 71, vested in the City of London Court.

Gaskell, for the defendant. The effect of s. 3 of the Act of 1868 was to create a class of Admiralty causes over which certain county courts specified by Order in Council were to have jurisdiction, and by s. 5 the specified Courts were to have exclusive jurisdiction over these Admiralty causes; the general jurisdiction of the county court judge under the Act of 1846, by virtue of which he might have tried the present cause before 1868, is taken away by the later Act so far as regards the Admiralty causes named in s. 3 of that Act. This is an Admiralty cause within that section, and the prohibition ought to go. The case of *Reg.* v. *Judge of Southend County Court* (2) is distinguishable as being an action over which the county court judge had Admiralty jurisdiction by virtue of the County Courts Admiralty Jurisdiction Amendment Act, 1869, which latter Act did not specifically state that the causes referred to therein should be Admiralty causes within the meaning of the Act of 1868.

Back, for the plaintiffs, was not called upon.

DAY, J. I think that this appeal must be dismissed. It is quite clear that the county court had jurisdiction to try such a case as the present before the passing of the Act of 1868, and there is nothing in that Act to suggest an intention on the part

(1) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 2, county courts may be appointed by Order in Council to have Admiralty jurisdiction:

By s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction . . . to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes): . . .

(3.) As to any claim for damage to cargo, or damage by collision,— any cause in which the amount claimed does not exceed 300*l*."

By s. 5: "From and after the time specified in each Order in Council under this Act appointing a county court to have Admiralty jurisdiction within any district as the time from which this Act shall have effect in and throughout that district, no county court other than the county court so appointed shall have jurisdiction within that district in any Admiralty cause. . . ."

(2) 13 Q. B. D. 142.

1887

SCOVELL v. BEVAN.

of the legislature to take away from the county court the jurisdiction which it previously had.

WILLS, J. I am of the same opinion, and for the same reasons. This is not the first time that this question, or one somewhat similar, has been raised, and I have come to the same conclusion that the Court arrived at in *Reg.* v. *Judge of Southend County Court.* (1) The Act of 1868 gave to the county courts a new jurisdiction, and did not take away the old one which they had under the provisions of the original County Court Act of 1846 (9 & 10 Vict. c. 95). Where it is necessary in dealing with a case to resort to the remedies and to make use of the powers newly conferred on the county court by the Act of 1868, then it must be dealt with as an Admiralty cause, and exclusive jurisdiction over it is given to the Courts specified in the Order in Council. Where, as in the present case, it is not necessary to resort to any power or jurisdiction which the county court had not before the Act of 1868 I agree with the remarks of A. L. Smith, J., in *Reg.* v. *Judge of Southend County Court* (1), that there is not a word in the Act of 1868 which impairs or interferes with the old county court jurisdiction.

Appeal dismissed.

Solicitors for plaintiffs: *Farnfields.*

Solicitors for defendant: *Keane, Marsland & Bryden.*

(1) 13 Q. B. D. 142.

W. J. B.

[IN THE COURT OF APPEAL.]

1887
July 14.

ESDAILE AND ANOTHER, RESPONDENTS; *v.* THE ASSESSMENT COMMITTEE OF THE CITY OF LONDON UNION, APPELLANTS.

Poor-rate—Tithes in London—Rate on House Property—Commutation for Fixed Annual Payment—Payment in Lieu of Tithes—37 *Hen.* 8, *c.* 12—44 *& 45 Vict. c. cxcvii.*—43 *Eliz. c.* 2.

By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London and their successors of a rate made upon the inhabitants and calculated upon the rent of the houses in the city. In this and several subsequent statutes these payments were described as tithes.

A special Act passed in 1881 provided that all tithes and sums of money in lieu of tithes arising or growing due in a parish in London should cease and be extinguished, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum, to be levied and collected in the same manner as the poor-rates. Neither the above-mentioned tithes nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor:—

Held, affirming the decision of the Queen's Bench Division, that the owner was not rateable to the poor-rate in respect of this fixed annual sum, as such sum was a personal payment, and was not a payment in lieu of tithes rateable under 43 Eliz. c. 2.

APPEAL from the judgment of the Queen's Bench Division, reported 18 Q. B. D. 599.

Messrs. Esdaile & Badcock, the present respondents, appealed against an assessment in a valuation list for the parish of St. Botolph Without, Aldgate, in the city of London, whereby they were assessed as lay impropriators of tithes of the value of 6500*l.* per annum. The Court of General Assessment Sessions allowed the appeal, and struck out the assessment from the valuation list, subject to the following case:—

William Clement Drake Esdaile and Henry Jeffries Badcock are trustees under the will of Edward Jeffries Esdaile, deceased, and in such capacity are possessed of all his interest as owner of certain tithes, or sums of money, arising in the said parish, and payable by virtue of 37 Hen. 8, c. 12, and of the annual sum of 6500*l.* in lieu and satisfaction of part thereof, payable by virtue of 44 & 45 Vict. c. cxcvii.

By 37 Hen. 8, c. 12 (An Act for Tithes in London), it is recited as follows:—"Where of late time contention, strife and

1887

ESDAILE v. ASSESSMENT COMMITTEE OF CITY OF LONDON UNION.

variance hath risen and grown within the city of London and the liberties of the same between the parsons, vicars and curates of the said city, and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations and other duties within the said city and liberties." The Act then provides that certain commissioners therein named may make a decree for appeasing the same, which decree shall stand, remain and be as an Act of Parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being as the said parsons, vicars and curates and their successors for ever.

The decree commences as follows: "As touching the payment of tithes in the city of London and the liberties of the same, it is fully ordered and decreed by Thomas, Archbishop of Canterbury" (here follow the names of the other commissioners), "that the citizens and inhabitants of the said city of London and liberties of the same for the time being shall yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars and curates of the said city and their successors for the time being after the rate hereafter following, that is, to wit, of every 10*s.* rent by the year of all and every house and houses, shops, warehouses, cellars, stables and every of them within the said city and liberty of the same 16½*d.*, and of every 20*s.* rent by the year of all and every such house and houses, shops, warehouses, cellars and stables, and every of them within the said city and liberties 2*s.* 9*d.*, and so above the rent of 20*s.* by the year, ascending from 10*s.* to 10*s.* according to the rate aforesaid."

Edward Jeffries Esdaile was, at the time of his death on February 14, 1881, owner of the tithes or sums of money arising in the parish and payable under 37 Hen. 8, c. 12.

By s. 16 of the London (City) Tithes Act, 1879 (42 & 43 Vict. c. clxxvi.), (An Act for the Commutation of Tithes in the city of London, and for other purposes): "Nothing in this Act contained shall apply to or in any wise affect the parish of St. Botolph Without, Aldgate, or any rights of Edward Jeffries Esdaile or his successors in title to tithes, or payments instead of tithes, arising or growing due within the said parish."

By the London (City) Tithes (St. Botolph Without, Aldgate)

Act, 1881 (44 & 45 Vict. c. cxcvii.), ("An Act to commute the Tithes in the parish of St. Botolph Without, Aldgate, in the city of London, and for other purposes"), it is recited as follows:—

"Whereas by the Act of 1879 (s. 16) it was enacted that nothing therein contained should apply to or in any wise affect the parish of St. Botolph Without, Aldgate, or any rights of Edward Jeffries Esdaile, or his successors in title to tithes, or payments instead of tithes, arising or growing due within the said parish. And whereas there are disputes as to the payments to be made in respect of tithes in the said parish of St. Botolph Without, Aldgate, and it is expedient for the settlement of the same, and it will be beneficial to the inhabitants of the said parish and the owner of the tithes of the said parish, that all such disputes should be settled, and that there should be paid to such owner a fixed annual sum in lieu and in full satisfaction of all tithes, or payments in lieu of tithes, within the said parish in manner hereinafter mentioned."

By s. 2 the term the "tithe owner" is defined to mean "the person or persons for the time being who, but for this Act, would have been entitled to the tithes, or sums of money in lieu of tithes, arising or growing due in the said parish."

By s. 3: "All tithes and sums of money in lieu of tithes whatsoever arising or growing due in the said parish except upon" certain railway stations, "shall as from the 29th day of September, 1881, cease and be extinguished, and the tithe-owner shall, as from that day, accept and receive in lieu and satisfaction of the tithes, and sums of money in lieu of tithes so ceasing and extinguished, and to which he would have been entitled if this Act had not been passed, the annual sum of 6500*l.*, which shall be levied and collected by the churchwardens on and from the persons by law rateable to poor-rates in the said parish in respect of the houses by law rateable to poor-rates" (except certain railway stations) "and shall be assessed on the annual rateable value of those houses as ascertained by the valuation or assessment for the poor-rates for the time being in force, and the said sum of 6500*l.* shall be paid by the churchwardens to the tithe-owner in each and every year after the said 29th day of September, 1881,

1887

ESDAILE v. ASSESSMENT COMMITTEE OF CITY OF LONDON UNION.

by two half-yearly payments, and the first of such half-yearly payments shall be made on the 25th day of March, 1882."

In the valuation list in respect of which the appeal arises which was duly made by the overseers and approved by the assessment committee of the city of London Union, the description of the property was "tithe" of which the Esdaile Trustees were described as occupiers and in the column headed "name of owner" was inserted "lay impropriator." It was admitted that the said tithes or sums of money, or the annual sum in lieu and satisfaction of part thereof, had never been assessed for the relief of the poor, nor had any person been rated in respect thereof.

By the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 51, it is provided that the overseers shall include in every valuation list "tithes, and payments in lieu of tithes, and every hereditament in their parish, and shall enter every hereditament in the valuation list in accordance with the classes mentioned in the third schedule to this Act."

It was contended on behalf of the present respondents that the sum of 6500*l.* ought not to have been inserted in the valuation list or assessed to the relief of the poor, on the grounds that the payments under 37 Hen. 8, c. 12, were not rateable, as they were not tithes within the meaning of 43 Eliz. c. 2, and that the annual sum payable in lieu and satisfaction of part thereof under 44 & 45 Vict. c. cxcvii., was not rateable, as it was not a money payment in lieu of tithes within the meaning of 43 Eliz. c. 2, and that neither the payments under 37 Hen. 8, c. 12, nor the sum of 6500*l.* had ever been assessed or rated.

It was contended by the assessment committee that the sum of 6500*l.* was tithes within the meaning of 43 Eliz. c. 2, or a payment in lieu of such tithes, and was therefore properly inserted in the valuation list.

The Court of general assessment sessions held that the payment of 6500*l.* was not tithes within the meaning of 43 Eliz. c. 2, nor a payment in lieu of tithes, and ordered that the valuation list be altered by striking out the entry relating to the hereditaments the subject of the appeal.

The Divisional Court affirmed the order of sessions, see 18 Q. B. D. 599.

The assessment committee appealed.

Sir Edward Clarke, Q.C., S.G., and *J. Henderson*, for the assessment committee.

Sir Richard Webster, Q.C., A.G., and *Sidney Woolf*, for the respondents.

The arguments were the same as in the Court below, the following additional authorities and statutes being referred to: *Champneys* v. *Buchan* (1); 1 Eagle on Tithes, 17, 421; 2 Eagle on Tithes, 442, 464; 7 & 8 Will. 3, c. 6; 7 Geo. 4, c. cxvi.; 27 & 28 Vict. c. cclxviii.

LORD ESHER, M.R. In this case we have to consider whether this payment of a specific sum of money, made to the respondents under and by virtue of an Act of Parliament, and to be raised by a rate, is property rateable to the relief of the poor. The question is whether that payment is primâ facie a payment which would be rateable under the statute 43 Eliz. c. 2. I am clearly of opinion that it is not. Having in *Reg.* v. *Christopherson* (2), decided that a person must be rated with reference to his ability in the parish, and having laid it down that according to the authorities the property rateable must be limited to property of a visible or tangible nature, such as is capable of being taken cognizance of and estimated by the overseers, it is obvious that this payment of money to be raised by a rate is not property which is primâ facie rateable under the statute of Elizabeth.

It is said, however, that it is a payment of tithes or a payment in lieu of tithes within the statute of Elizabeth, and is therefore rateable. Now a tithe rateable as tithe under the statute of Elizabeth was that tithe which was at first received by the clergy of the parish in kind, and it was because the clergyman received it in kind, and because he could distrain for it, that it was considered to be physically in his occupation, for he took it in kind from the land. The tithe in the present case is certainly not such a tithe as that, and whether tithe, that is, a tenth, is the right name for it or not, it is not a tithe rateable under 43 Eliz. c. 2. Is it then brought within the statute by the authorities as

(1) 4 Drew. 104. (2) 16 Q. B. D. 7.

1887

ESDAILE v. ASSESSMENT COMMITTEE OF CITY OF LONDON UNION.

Lord Esher, M.R.

something equivalent to a tithe? For if it could be shewn, as was said in *Reg.* v. *Christopherson* (1), that the money payment here was a payment in lieu of tithes, the rector would, according to the authorities, have been rateable in respect thereof; and if the rector had been rateable, the present respondents would be rateable. It is said that it has been made out that this is a payment in lieu of tithes, because the payment is called a tithe in the statute of 37 Hen. 8, c. 12. But surely it is impossible to say that the mere fact of calling it a tithe in a statute shews that this payment is a payment in lieu of tithes proper within the statute of Elizabeth. You must shew, not merely that it is a payment in lieu of what were called tithes, but a payment in lieu of such tithes as come within the statute of Elizabeth. As to the suggestion that this is a payment in lieu of tithes, payable by custom at the time of the passing of 37 Hen. 8, c. 12, in respect of houses in the city of London, though I doubt whether such a custom could be a good one, I can see no evidence of such a custom, or even of a custom that the land on which the houses were built was still to be liable to a payment in lieu of tithes in cases where tithes would have been paid out of the land, if productive, before the houses had been built upon it. Therefore it is not made out that this payment under 37 Hen. 8, c. 12, is a payment in lieu of tithes payable in respect of land on which houses were built. It was then argued that this was a payment made by the occupiers of houses in lieu of tithes payable, not in respect of the land on which those houses were built, but in respect of land in the parish on which no houses were built. One ought to look very closely at such a proposition, because if it were true it would be making people who occupy houses pay money in lieu of those who occupy land profitably upon which no houses are built, and who would be exempt from paying tithes in respect of that land. It would require very strong evidence to satisfy me of that, for anything more unjust can hardly be imagined. To support that proposition it must first be shewn that if there were tithes payable in respect of land profitably used as land in the city at the time of the passing of 37 Hen. 8, c. 12, the payment of those tithes was extinguished by

(1) 16 Q. B. D. 7.

this Act. I can see nothing to induce me to believe that if they did exist, they were extinguished. Sects. 10, 14, and 17 of 37 Hen. 8, c. 12, are scarcely consistent with that view, and are more consistent with the view that if there was any land occupied for profit—and I cannot say that there was at that time no such land in the city of London—the persons so occupying such land were still, after the passing of that statute, as much liable to the payment of tithes as they were before. Therefore supposing in the first place that no tithe was payable within the city of London, then this is a new personal imposition, which is not a tithe, or anything in lieu of a tithe, rateable under 43 Eliz. c. 2; or, secondly, if there were tithes proper within the city of London, that is a tithe payable in respect of the profitable use of land, there is nothing to shew that such tithes were extinguished. In either case it is not made out that this payment was a payment in lieu of tithes rateable under 43 Eliz. c. 2.

Then, further, we have this: the statute 37 Hen. 8, c. 12, was in the nature of a private Act of Parliament to determine a dispute between the parishioners and the clergy. It is impossible to say that a recital that there was a dispute as to payment of tithes is proof that tithes were payable. And when it is seen that this Act amounts to an agreement by way of compromise, one is then entitled, if the words will permit of two meanings, to see how it has always been treated by the parties to it on both sides. For 286 years there never has been any attempt until now to rate the person entitled to this payment. Therefore it is conclusive that all parties concerned in this compromise have construed it to mean that the person who received that payment was not rateable to the poor in respect thereof, but was entitled to the full benefit of the payment. These considerations seem to me to shew conclusively that this payment cannot be brought within 43 Eliz. c. 2.

There are some other considerations which seem to me to point in the same direction. There are sections in the statute of 1881 (44 & 45 Vict. c. cxcvii.) which seem to me to assume that there were even then tithes payable within this parish in respect of lands which were not built upon. I notice this, because those sections are only wanted on the view that those tithes were

1887

ESDAILE v. ASSESSMENT COMMITTEE OF CITY OF LONDON UNION.

Lord Esher, M.R.

payable. Again, the mode of redemption provided in s. 10 of the Act of 1881 points in the same direction; for when the parties were stipulating for a redemption, the redemption is to be on the footing that the whole of the money and nothing less is payable to the person entitled to the payment; and if it is to be redeemed, it is to be on the footing that it is a property which is subject to no reduction, but which is to be replaced by a sum which would yield the former annual amount without any deduction. That supports the view that this payment is a personal payment originally given for the support of the clergy, and is not a tithe or a payment in lieu of a tithe rateable under 43 Eliz. c. 2.

For these reasons I am of opinion that this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The question which we have to consider is whether a certain annual payment of 6500*l.* made to the respondents under the provisions of the London (City) Tithes (St. Botolph Without, Aldgate) Act, 1881, is or is not rateable to the poor.

The object of the Act under which the sum is payable was not to make this payment liable to poor-rate; the object was totally different, namely, to settle certain disputes which had existed between the parishioners and Mr. Esdaile as to the sums payable by them to him in respect of what is called tithe for houses in the parish. He and his predecessors in title had been accustomed to receive certain payments in respect of houses which I may call house-tithes, under 37 Hen. 8, c. 12, and so far as we know there were no other tithes payable in this parish to anybody, except what are called tithes payable under that statute. Disputes had arisen respecting these payments, and the Act of 1881 was passed to put an end to all those disputes by fixing a certain annual sum to be paid to Mr. Esdaile by the inhabitants, that sum to be levied by a rate. The object was to substitute a fixed payment which was incapable of being disputed for a payment which gave rise to controversy. That being the object, one is struck with the contention that this statutory payment of £6500 should be rateable to the poor, if that in respect of which it was given never was rateable. That may be the effect of the Act, but if it

is, it seems to me to be contrary to the intention of the legislature in passing the Act.

Now, the house-tithe, under 37 Hen. 8, c. 12, had never been rated to the poor. It is incredible that that payment, whether you call it a tithe or a payment in lieu of tithe, should never have been rated to the poor, if by law it was rateable; and the only inference I can draw from that fact is that for some reason or other it was not considered as coming within the statute 43 Eliz. c. 2. The owner of this house-tithe was not the parson; he was a lay impropriator; and so he could not be reached under the first part of 43 Eliz. c. 2, s. 1. If he could be reached at all, it could only be under the latter part of the section, which treats of occupiers of tithes impropriate and propriations of tithes. One can only account for the fact that this house-tithe never was rated on the theory that those words in that statute do not apply.

We are asked then to say that this 6500*l.* a year is rateable to the poor, when that for which it was substituted never was rated, because it was not considered as being within 43 Eliz. c. 2. The argument pressed upon us is based on the fact that this house-tithe is called a tithe in 37 Hen. 8, c. 12; that the disputes about it are referred to in the preamble of the Act of 1881 as disputes about tithes; and we are therefore asked to say that this house-tithe was a tithe or a payment in lieu of tithe and ought to be held rateable under the statute of Elizabeth. I cannot say so. No one knows what was the real state of tithe law in the City before 37 Hen. 8, c. 12. I do not know whether tithes were payable in the City or not, and I do not know whether what are called tithes were tithes proper; and so it appears to me that the only inference to be drawn from what we do know is that for some reason or other those payments were not rateable within 43 Eliz. c. 2. There is nothing in the Act of 1881 which brings them within the statute of Elizabeth, and I think there is something which indicates that they were not intended to be brought within it. Looking at the preamble of the Act of 1881 and the redemption clause, it is clear that this Act was the result of a compromise, and a person who was entitled to receive certain sums not rateable to the poor was to have a fixed annual sum in lieu thereof, nothing being said as to whether it was rateable to the

1887

ESDAILE v. ASSESSMENT COMMITTEE OF CITY OF LONDON UNION.

Lindley, L.J.

poor or not. It could not have been intended that the fixed sum should be rateable when the other was not. It would be departing from the apparent bargain, and taking advantage of some ambiguous expressions in the Act to saddle this statutory payment of 6500*l.* with a liability to a rate. It is impossible to ignore the facts that I have mentioned, and to hold that this new statutory payment is in any way more rateable than the old payments for which it was substituted. The appeal must therefore be dismissed.

LOPES, L.J. The assessment committee to succeed must make out that these payments under 37 Hen. 8, c. 12, were either tithes within the meaning of 43 Eliz. c. 2, or payments in lieu of such tithes. The statute of Elizabeth is the only statute which deals with the subject-matter of rateability, the other statutes more or less dealing with the machinery of rating. A payment in lieu of tithes in order to be rateable must be in lieu of tithes rateable under the statute of Elizabeth. These payments with which we have to deal in the present case are clearly not tithes as understood at common law. At common law tithes are payments on things which grow from year to year, and not upon houses or rent reserved upon a lease of houses. These payments have none of the attributes of what I may call tithes at common law. Tithes at common law are charges upon the land, and recoverable by distress. These payments are not charges on the land recoverable by distress, but are mere personal charges recoverable by a personal remedy.

The next question is, are they payments in lieu of tithes rateable under 43 Eliz. c. 2? To be payments in lieu of tithes, the tithes must have existed and must have been extinguished by the Act of Henry 8. It is left in the utmost obscurity, and we have no means of knowing whether such tithes ever existed within the city of London. But assuming that they did exist, I am clearly of opinion that they were not extinguished by the Act of Henry 8. The probability is that the land within the City had been largely built upon, and that tithes had thereby to a great extent been extinguished; and I am inclined to think that there were other lands within the City not built upon, and as to

those lands if tithes existed at all tithes would still have been leviable. It is important to see how this Act of 37 Hen. 8, c. 12, came to be passed. The explanation seems to me to be that a large portion of the land having become covered with buildings, tithes had been lost to the tithe owner, and that this Act was passed to give him a statutory payment in respect of houses, not in lieu of tithes, for they had been lost, but called tithes in the Act, leaving tithes on any other land, if there was any such land, leviable as before. That being my view, these payments cannot be considered as payments in lieu of tithes, and I am strongly confirmed in that view by the fact that for nearly 300 years no assessment has ever been attempted to be made in respect of these payments. It would be a breach of faith that when the tithe owners have agreed to take an annual sum of 6500*l.* in lieu of that which was not rateable to the poor, it should be said that this annual sum is rateable. I am therefore of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for assessment committee: *Baylis & Pearce.*
Solicitors for respondents: *Winter & Co.*

A. M.

1887
May 27.

THE REV. C. A. STEVENS, APPELLANT; BISHOP, RESPONDENT.

Income-Tax—Tithe Rent-charge—"Annual Value"—Income-Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *and* 1853 (16 & 17 *Vict. c.* 31).

The words "annual value" in s. 52 of the Income-Tax Act, 1842 (5 & 6 Vict. c. 35), when dealing with tithe commutation rent-charge, mean the sum which the tithe-owner actually receives, after deducting sums paid for rates and procurations, and also the sum which he necessarily and properly expends and is compelled to expend, in order to realise his tithe.

CASE stated for the opinion of the Court under s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19).

The Rev. C. A. Stevens, vicar of Portslade, Sussex, appealed against an assessment made upon him under Sched. A of the Income-Tax Act, 1842 (5 & 6 Vict. c. 35), for the year ending April 5, 1886, in the sum of 142*l.* 4*s.* 11*d.*, being the amount which the appellant admitted to have been received or to be receivable by him in respect of the vicarial commutation tithe rent-charge for the parish of St. Nicholas, Portslade, for that year, after deducting 16*l.* 14*s.* 2*d.* for rates and procurations, but from which amount he claimed to deduct a further sum of 12*l.* 18*s.*, being the costs incurred by him in the collection of the said tithe rent-charge, as appeared by the return made by him.

The commissioners for the Brighton division of the county, being of opinion that the deduction so claimed to be made by the appellant from the amount of the assessment was not, nor was any part thereof, authorized or admissible under the Income Tax Acts, dismissed the appeal, and stated this case for the opinion of the Court.

The question for the Court was, whether the appellant, for the purpose of assessment to income or property-tax in respect of vicarial tithe rent-charge received by him, was entitled to deduct from the amount so received the costs incurred in the collection thereof, or any and what part of such costs.

The case was argued on March 23, 1887, by

Meadows White, Q.C., for the appellant, and by

Sir Edward Clarke, Q.C., S.G., and *Dicey*, for the respondent.

The arguments, which involved a critical examination of the several provisions of the Income-Tax Acts, 1842 and 1853, relating to tithes, are sufficiently noticed in the judgment.

The following authorities were cited for the appellant: *Reg.* v. *Goodchild* (1), and *Dobbs* v. *Grand Junction Waterworks Co.* (2); and for the respondent *Black* v. *Coltness Iron Co.* (3), and *Mersey Docks and Harbour Board* v. *Lucas.* (4)

Cur. adv. vult.

1887. May 27. The judgment of the Court (A. L. Smith and Grantham, JJ.) was delivered by

A. L. SMITH, J. The question raised by the Crown in this case is, what is the meaning of the words "annual value" in the Income-Tax Acts, when applied to tithes? Do they mean, as the Crown contends, that the tithe-owner is bound to pay income-tax upon what he does not and *never can* receive for himself? or do they mean, as the appellant contends, that he is only to pay the tax upon what the tithe is annually worth to him?

The appellant, the Rev. Dr. Stevens, for the year ending April 5, 1886, received, in respect of vicarial commutation tithe rent-charge for the parish of St. Nicholas, Portslade, of which he was vicar, after deducting the sum of 16*l.* 14*s.* 2*d.* for rates and procurations, which are admitted to be proper deductions, and the sum of 12*l.* 18*s.*, which is in dispute, the sum of 146*l.* 1*s.* 1*d.*, and no more. The question is whether the appellant should pay income-tax upon the amount he received, viz. 146*l.* 1*s.* 1*d.*, or upon 158*l.* 19*s.* 1*d.*

The Solicitor-General, who argued the case for the Crown, admitted, for the purposes of this case and of the argument he adduced, that the 12*l.* 18*s.* was an amount which the Rev. Dr. Stevens had necessarily and properly to expend and was compelled to expend in order to realise his tithe. It was upon this basis that this case was argued, and it is upon this that our judgment is given.

By the Income-Tax Act, 1842 (5 & 6 Vict. c. 35), s. 52, it was

(1) E.B.&E. 2; 27 L.J. (M.C.) 233.
(2) 9 Q. B. D. 151; 10 Q. B. D. 337; 9 App. Cas. 49.
(3) 6 App. Cas. 315.
(4) 8 App. Cas. 891.

1887

STEVENS v. BISHOP.

A. L. Smith, J.

enacted that every person chargeable under the Act should prepare and deliver to the appointed person a true and correct statement in writing, *in such form as the Act requires*, and signed by the person delivering the same, containing the *annual value* of all lands and tenements in his occupation. The residue of the section applies to gains and profits under Sched. D., and has no reference to the case of tithe.

By Sched. A., Rule No. I of this Act, it is provided that the *annual value* of lands, tenements, hereditaments, and heritages charged under Sched. A shall be understood to be the net rent by the year at which the same are let at rack-rent,—which rule shall be construed to extend to all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed.

It was stated on the part of the Crown that it was under this schedule that tithes under this Act were assessable to the income-tax; for, rules under No. II. of the Sched. A., though dealing specially with tithes *in kind* and tithes compounded, excepted rent-charges confirmed under the Act passed for the commutation of tithes, and which Act we understand applies to the St. Nicholas vicarial tithe in question.

Why this exception was made from this rule 3, No. II., of Sched. A., we do not know; nor could the Solicitor-General or Mr. Dicey enlighten us upon the subject. It appeared to us to be of importance, and for this reason. By No. II. of Sched. A., rules. 1 and 3, the annual value of tithes *in kind* and of tithes compounded for was to be understood to be the full amount for the year of the *profits* received therefrom within the respective times limited. Mark the word profits! Why should there be any distinction upon what a tithe-owner should pay income-tax, between a tithe-owner of tithe *in kind* or to the owner of tithes compounded for, and a tithe-owner of tithe commuted by the 6 & 7 Wm. 4, c. 71? The same allowances were made by the statutes in respect of each: and the law officers of the Crown were wholly unable to give any reason why there should be any distinction between the three classes of respective tithe-owners as to upon what they respectively were to pay income-tax. No one, we suppose, would say, nor could it be successfully con-

tended, that, if a tithe-owner had to pay upon profits, he was to pay upon the gross amount of the tithe without allowing the necessary outgoings to realise such tithe.

By the Income-Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. A., it is enacted that there shall be paid annually "for and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every 20*s.* of the annual value thereof, &c." What is the meaning of the words "annual value?" in other words, what is it that is to be taxed? Is it the amount which the tithe-owner, i.e. the taxpayer, never can receive for himself? or is it the amount actually received by him for himself? As was said by Lord Bramwell in the case of *Dobbs* v. *Grand Junction Waterworks Co.*, in the House of Lords (1), "*Value means net value:*" and, in our judgment unless there be something in these Income-Tax Acts to shew that value means gross and not net value, the amount to be taxed is the amount received by the tithe-owner for himself, or, in other words, the net annual value of the hereditament to the recipient. The question then is this,—Is there anything in these Acts to shew that annual value means gross and not net value to the recipient?

It was insisted on the part of the Crown that annual value meant, as regards title, the value of the hereditament or heritage, i.e. of the thing owned and let, and not the annual value of the thing owned to the person owning it. It is true, a definition is given in rule I., Sched. A., of the Act of 1842, of annual value of land, but no definition as regards annual value of tithe except what may be gleaned from rule 2, Sched. A. The Crown insisted that the sole deductions to be allowed were those set forth in Sched. A. No. IV. rules 9 and 10, and Sched. A. No. V., of the Act of 1842, and in s. 32 of the Act of 1853. But this, as it seems to us, is begging the question. The real question is, what, as regards tithe, is the meaning of "annual value" before the permitted deductions are to be made. Does it mean gross annual value, no matter how much it may necessarily cost to collect and get in? or does it mean net annual value to the person receiving it?

It was said by the Crown that, under Sched. A. No. IV., rule 4,

(1) 9 App. Cas. at p. 55.

1887

STEVENS v. BISHOP.

A. L. Smith, J.

of the Act of 1842, the commissioners might get an *assessment* upon full tithe, i.e. gross tithe, from the occupier himself; and, although it was admitted the contention created a hardship, yet it was said that such was the law; for, why, said the Crown, should it be that by proceeding one way they could get an assessment on gross tithe and by the other way an assessment only upon the net tithe?

The arguments, therefore, pro and con, may be summed up as follows:—The appellant says by the Acts a tithe-owner is to pay either upon *profits* or upon the *annual value*, which he insists are synonymous terms in these Acts as regards tithes. The Crown is not able to say why it should be held to be otherwise, but insists that, deductions being given by the statute, these are the sole deductions to be allowed. But it seems to us that this contention does not avail; for, by the statutes, the same deductions are allowed to all three classes of tithe-owners, whether they pay upon "profits" or "annual value." If upon profits, it appears to us patent that the present deduction should be allowed: then, why not if upon annual value?

The Crown further says, that, if the commissioners levied the tithe direct from the occupiers, they could get income-tax without allowing the deduction in dispute. And it seems to us that they could: but the point does not lead us to the conclusion that, as against the tithe-owner, he is not entitled to the deduction in this case claimed.

We cannot ourselves see that in these taxing Acts the tax is imposed upon the gross amount of tithe, or that there is anything in these Income-Tax Acts to shew that "annual value" of tithe is to have any other construction than that put upon the same words in *Dobbs's Case* (1); and in our judgment in this case the appellant is only bound to pay income-tax upon the amount of tithe which he in fact received for himself, viz. upon the 146*l.* 1*s.* 1*d.*, and that he is entitled to judgment, and with costs. We give judgment accordingly.

Judgment for the appellant.

Solicitors for appellant: *White, Borrett, & Co.*

Solicitor for respondent: *Solicitor to the Inland Revenue.*

(1) 9 App. Cas. 49. J. S.

COURTNEY *v.* COLE.

1887
May 19.

Ship—Compulsory Pilotage—London District—Exemption—"Ship trading" to Place north of Boulogne—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 379—*Privy Council Order*, 21 *December*, 1871.

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, ships trading to any place in Europe north of Boulogne are, when not carrying passengers, exempted from compulsory pilotage in the London district.

A British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London.

On a return voyage from the East she went, as usual, to London. She there discharged part of her cargo and her crew, and then, with the bulk of the cargo and a crew of runners, but without passengers, proceeded to Holland:—

Held, that she was a ship "trading to" a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district.

Case stated by justices of Gravesend under 20 & 21 Vict. c. 43.

The appellant was convicted upon an information under s. 353 of the Merchant Shipping Act, 1854, for unlawfully piloting his ship without possessing a pilotage certificate.

It appeared that the ship *Cardiganshire*, of which the defendant was the master, arrived in London on April 22, 1886, with a cargo from Japan, China, and the Straits Settlements, she having shipped such cargo at such places, or some or one of them, for, and being bound to discharge part of such cargo in London, and to take the rest on to Amsterdam and Hamburg. She accordingly discharged part of her cargo in London, and, in order to get at the London cargo, part of the cargo for Amsterdam and Hamburg was also discharged and afterwards reshipped. The crew, who had signed articles for a round voyage from London to the East and back to London, were discharged, and runners were shipped on coasting articles for the voyage from London to the Continent and back. The *Cardiganshire* left London on April 28 for Amsterdam and Hamburg, with the rest of the cargo (including what was reshipped as aforesaid) which she had brought from Japan, China, and the Straits Settlements, but without any fresh cargo from London, and without passengers. Whilst

1887

COURTNEY v. COLE.

proceeding down the Thames and off Gravesend on such outward passage, she was boarded by the informant, Cole, a pilot duly licensed for the London pilotage district below Gravesend, and he offered to the defendant, the master, to take charge of the ship for the purpose of piloting her to the seaward limits of such pilotage district below Gravesend. The defendant refused this offer, and continued himself to pilot the ship throughout such limits without possessing a pilotage certificate enabling him so to do. At this time (being the time of the alleged offence) the ship was in the London pilotage district below Gravesend, and bound for Amsterdam.

The ship was a British ship, and belonged to the port of London.

At Amsterdam she discharged the cargo destined for that port, and then proceeded to Hamburg to discharge the cargo for that port, and then took in at Hamburg a fresh part cargo for Japan, China, and the Straits Settlements, with which she returned to London, where such part cargo was taken out and reshipped with further goods to complete her cargo outwards, and she thereupon proceeded to Japan, China, and the Straits Settlements on her next voyage with a full cargo shipped as aforesaid.

On her said passage from Japan, China, and the Straits Settlements, on reaching the London pilotage district off Dungeness, she took a pilot up to Gravesend, but pilots may be taken by both exempted and unexempted ships.

For some years before the voyage in question, the *Cardiganshire* had made similar voyages, and she is one of a line of steamers which sail regularly from London to ports in the East and back to London, and thence to ports in Europe north of Boulogne and back to London.

Upon these facts it was contended on the part of the defendant, that at the time in question (April 28) the ship was exempted from compulsory pilotage by s. 379 of the Merchant Shipping Act, 1854, as being (within the commencing words of that section) a ship in the London district not carrying passengers, and (within sub-s. 3) a ship trading to a place in Europe north of Boulogne.

It was contended on the part of the informant that s. 379 was intended to exempt such ships only as were engaged in regular trade between London and Boulogne, and ports to the north thereof, and in carrying cargoes between such ports and originally shipped thereat, and that as the ship took no cargo in at London, but in proceeding thence had only as cargo what she had brought from Japan, China, and the Straits Settlements, she was not trading from London to Amsterdam, but from Japan, China, and Strait Settlements to Amsterdam, and that her coming up the river to London and there discharging part of her cargo did not make her, on her subsequent passage for Amsterdam and Hamburg, trading from London, nor within the exemption.

It was claimed that she was exempt while between London and Gravesend, as being (in the words of sub-s. 5 of the said s. 379 of the Act of 1854), "a ship navigating within the limits of the port to which she belongs," so that the question in this case was restricted to the ship while below Gravesend.

The justices held that the ship was subject to compulsory pilotage, on the ground that she was not within the exemption given by sub-s. 3 of the said s. 379, inasmuch as she did not confine her trading to the limits stated in that section, namely, between the London district and a place in Europe north of Boulogne, and on the passage in question did not take in any cargo while in the London district except what was landed from her and re-shipped as aforesaid.

If the Court should be of opinion that in the London pilotage district below Gravesend the ship was exempt from compulsory pilotage on her said passage from London for Amsterdam on April 28, 1886, under the circumstances aforesaid, then the information was to be dismissed.

1887. May 12, 13. *Gainsford Bruce, Q.C.* (*James Fox*, with him), for the appellant. The vessel was exempt from compulsory pilotage. She was "trading to" a place north of Boulogne within 17 & 18 Vict. c. 104 (the Merchant Shipping Act, 1854), s. 379 (3). The respondent would construe those words as meaning "engaged in regular trade." But they are not so restricted. The

1887

COURTNEY v. COLE.

former exemption in 6 Geo. 4, c. 125, s. 59 (1), of "any constant trader inwards" has been extended by the Act of 1854. Moreover, the respondent would insert the words "from London." The place from whence the cargo started does not affect the question.

The decisions on the section are not adverse to the appellant. In *The Wesley* (2), Dr. Lushington held that it covered inward as well as outward voyages, and in *The Agricola* (3), that a vessel ordinarily occupied in foreign trade going from Liverpool to London in ballast in order to sail from London was not a ship "employed in the coasting trade," and in *The Lloyds* or *Sea Queen* (4), that the fact of a cargo being on such a vessel made no substantial difference. But the word "employed" is more limited than the words "trading to."

Secondly, this ship was a constant trader, as the findings in the case shew,

Bucknill, Q.C. (*Aspinall*, with him). Although 6 Geo. 4, c. 125, is repealed, the exemptions therein have been retained in 17 & 18 Vict. c. 104. By s. 353, subject to any alteration to be made by any pilotage authority in pursuance of the power thereinbefore given, "the employment of pilots shall continue to be compulsory" in all districts in which the same was by law compulsory immediately before the Act, and "all exemptions from compulsory pilotage then existing within such districts shall also continue in force and every master of any unexempted ship

(1) By 6 Geo. 4, c. 125, s. 59, the master of any vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic, was exempt from pilotage.

By the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 379: "The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts, that is to say: . . . .

"(3.) Ships trading to Boulogne or to any place in Europe north of Boulogne:"

"(6.) Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein."

(2) Lush. 268.

(3) 2 Wm. Rob. 10.

(4) Brown. & Lush. 359.

navigating within any such district" who pilots her without a pilotage certificate, or employs an unqualified pilot after a qualified pilot has offered to take charge of her, is liable to a penalty. The exemptions in 6 Geo. 4, c. 125, s. 59, qualify ss. 376 and 379 of the Act of 1854: *The Earl of Auckland* (1), so that reference to 6 Geo. 4, c. 125, is necessary, and the exemption in s. 59 is of a vessel trading to the northern places named, or "of any constant trader inwards from the ports between Boulogne inclusive and the Baltic." The mistake in using the word "inwards" was corrected by an order of the Privy Council of February 18, 1854, applying the provisions to traders outwards. That order was before the Act of 1854. Sect. 379 of the Act of 1854 summarises the exemptions of vessels from pilotage when not carrying passengers. It relates to three classes, viz., vessels passing through the pilotage district; those going from a place inside to a place outside; those going from a place inside to a place inside, viz., coasters.

The principle of the exemption is stated by Dr. Lushington, as to coasters in *The Agricola* (2) to be, "that the masters of such vessels, from their occupation and experience, are supposed to be so familiarly acquainted with the English coasts, that it would be superfluous and oppressive upon the owners to impose upon them the necessity of employing a pilot on board." The same principle applies to the other exemptions. Constant familiarity with the varying dangers of the home waters is the reason of the exemption. "Compulsory pilotage is not a charge upon vessels but rather a regulation instituted for their benefit," per Dr. Lushington in *The Hanna.* (3) A vessel is not a coasting vessel unless she is regularly employed as such, and a vessel is not a trader unless regularly trading; she must be a constant trader. By Order in Council of December 21, 1871, a by-law was approved which provides "that all ships trading from any port or place in Great Britain, within the London district, ... to the port of Brest, in France, or any port or place in Europe north or east of Brest when not carrying passengers, shall be exempted from compulsory pilotage within such districts." So that Brest

(1) Lush. 164. (2) 2 Wm. Rob. 10, at p. 17.
(3) Law Rep. 1 A. & E. 283, at p. 290.

1887

COURTNEY v. COLE.

is substituted for Boulogne. The ship must be trading "from" a British port to Brest or to the north of Brest. The *Cardiganshire* was not "trading" from London to Amsterdam. "Trading" must be taken to mean habitually trading. She was not within sub-s. 6. It was found that the words as to anchoring in sub-s. 6 were not suitable, and therefore the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 41, while extending the exemption of ships passing through a district, provided that the exemption in this section should not apply to ships "loading or discharging" at any place situate within such district . . ." If she loads or discharges she must employ a pilot. As Brett, M.R., said in *The Winston* (1), "The object, in fact, is that she shall do so when she not merely passes through a district or momentarily stops in it, but enters a port for a definite purpose." In that case loading coals within the district deprived the vessel of the exemption. The *Cardiganshire* was bound to and entered the port of London for a definite purpose, and discharged some cargo there.

Gainsford Bruce, Q.C., in reply. *The Agricola* (2) was decided before the Merchant Shipping Act, 1854, and the case turned on the Liverpool Pilot Act (5 Geo. 4, c. lxxiii.), in conjunction with the General Pilot Act (5 & 6 Geo. 4, c. lxxv.), and the question was as to the meaning of the expression "coasting voyage." The intention of the legislature in the Merchant Shipping Act, 1854, was to extend the exemptions of 6 Geo. 4, c. 125. The principle enunciated by Dr. Lushington as to coasters does not apply to sub-s. 3, which exempts ships trading to the North Sea and the White Sea. The Order in Council lowering the compulsory pilotage district boundary to Brest is in favour of the appellant.

Cur. adv. vult.

1887. May 19. LORD COLERIDGE, C.J. I am of opinion that the magistrates were wrong, and that this vessel was exempt from compulsory pilotage. The ship started from Hamburgh; she came to London, where she took in some cargo, but chiefly her cargo was taken in at Hamburg or Amsterdam. She then came to London, and proceeded from London to Japan and China and ports in the East, and from the East she came back to

(1) 9 P. D. 85. (2) 2 Wm. Rob. 10.

London with a cargo chiefly for Amsterdam; but she came to the port of London on her way from the East to Amsterdam. In London, it is true, she discharged her crew; they were most of them taken on board again, and she proceeded from London to Amsterdam, having discharged some portion of her cargo in London.

Her object or trading is described in the case: "For some years before the voyage in question the *Cardiganshire* had made similar voyages, and she is one of a line of steamers which sail regularly from London to ports in the East and back to London, and thence to ports in Europe north of Boulogne and back to London." The 17 & 18 Vict. c. 104, has a number of sections, beginning with s. 376, devoted to the subject of compulsory pilotage, and there are certain rules given and certain enactments prescribed, subject to which all ships coming within those rules are obliged to have pilotage within the districts to which those rules apply. The 379th section is as follows:—[His Lordship read the section.]

Something was said about the possibility of the *Cardiganshire* being exempt under the sixth exemption, but I am of opinion that the true exemption which covers her is the third exemption: "Ships trading to Boulogne or to any place in Europe north of Boulogne." That is now Brest: "Ships trading to Brest or to any place in Europe north of Brest."

In the first place it is obvious that she is directly within the words of that exemption. She is a ship trading to a place in Europe north of Brest. It is said that we must look beyond the mere words of the section, because the reason of all these exemptions is to be found not in any protection or assistance or favour granted to particular trades; and that it has been held by great authority that this compulsory pilotage is not an impost upon trade, but for the benefit of the ships themselves and for the safety of human life; and, therefore, that we must see whether the principles of these exemptions will cover the general and possibly doubtful expression, "a ship trading to Brest or to any place in Europe north of Brest." I think it is impossible to say that these exemptions can all have been made upon the principle of protection to human life, and that favouring

1887

COURTNEY v. COLE.

Lord Coleridge, C.J.

particular trades had nothing to do with the exemptions, and it is only due to the respect one feels for Dr. Lushington to observe that, as far as I am aware, he never said that it was so with regard to all of them, nor did he apply the principle, which he undoubtedly laid down, to exemptions such as those which I have at present to deal with. He may have been, and probably was, quite right in saying that compulsory pilotage in itself is not intended to be an impost upon trade, but is intended to be a protection to ships and to the lives of persons carried in ships. He may have been quite right in saying that that was the principle of compulsory pilotage; but, nevertheless, it is impossible, as I think, to look at these exemptions and to say that the principle of favouring particular trades was not in the mind of the legislature when some, at least, of these exemptions were created, for example, that as to the coasting trade of the United Kingdom. It may be said possibly that a person who is engaged in the coasting trade of the United Kingdom must know all the shallows, and the headlands, and so forth, and can do without a pilot. At the same time one cannot but see that the coasting trade, being a small trade, chiefly carried on by small vessels, the exemption has, at all events, the effect, whatever may have been intended, of relieving the coasting trade of what otherwise would have been a heavy charge on ships of not more than sixty tons burthen without reference to the cargo they carry. I think it is impossible to say that that exemption is not for the direct purpose of lightening the burthen of navigation upon small ships. I pass over the third exemption, which is matter of dispute, for obvious reasons. I will come back to it when I discuss the other matters.

The fourth exemption is "Ships from Guernsey, Jersey, Alderney, Sark or Man which are wholly laden with stone being the produce of those islands." Now, if the ships come with fruit it would seem they are not exempt: if they come with stone they are. There is an exemption which is enacted in favour of a stone-carrying ship which is not enacted in favour of a fruit-carrying ship between exactly the same two termini. Can any one devise a reason, other than a desire to favour the stone trade, why that exemption should have been put in? That

exemption, at all events, seems intended to favour the stone trade between these smaller islands and this kingdom.

The other two exemptions are not important. The exemption of ships navigating within the ports to which they belong is possibly open to the observation that a person who is always navigating about within a port must know the port as well as a pilot. That may be an adequate reason for that exemption. But founding myself upon the first, second and fourth, it appears to me impossible to say that into those three exemptions there did not enter the notion of giving a favour to particular trades.

It is not for me to say whether the legislature thought that trading from London or from the Trinity House districts to the north of Europe did or did not require favour. It would be too speculative, in my judgment, to place the construction of words of this kind upon an historical basis. I think that this ship as a matter of fact when at the end of her voyage, so to say, she came back from the East to London and then went on with a cargo from London to Amsterdam, was a ship trading between London and Amsterdam. It is not necessary to consider whether it would have done from any other place, because it would clearly do from London. She was a ship trading between London and Amsterdam, a port north of Brest, and was doing that habitually. I say doing that habitually—not, as will be seen from my judgment, that I think it absolutely necessary that she should be habitually trading. I do not decide that it is not, but I do not decide that it is. It does not appear to me to be necessary here, because in point of fact this ship did habitually trade, and if it be necessary to apply the principle which Dr. Lushington applied to the coasting trade—that is to say, that the vessel must be constantly and steadily employed in the coasting trade—to a ship trading to the north of Europe, then I say that at all events in this case we are well within the authority of Dr. Lushington, because this ship was so constantly and habitually trading. If trading means constantly and habitually trading, then she was constantly and habitually trading between London and Amsterdam. She seems to me to come within the 3rd subsection of the 379th section of 17 & 18 Vict. c. 104, and therefore to be exempt from compulsory pilotage.

1887

COURTNEY v. COLE.

A. L. SMITH, J. The question in this case is whether the ship *Cardiganshire*, when sailing with a cargo on board from London to Amsterdam, was exempt from compulsory pilotage by reason of s. 379 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. The material facts as found in the case are as follows:— The *Cardiganshire* had sailed from China with a cargo on board for London and Amsterdam. On arrival in London she discharged such of her cargo as was for the port of London, and also her crew. With a crew of runners shipped on coasting-articles for the voyage from London to Amsterdam and back, and with her cargo for Amsterdam on board, she set sail upon that voyage. Was she then trading to Boulogne or to any place in Europe north of Boulogne, within the meaning of s. 379, sub-s. 3, of the Merchant Shipping Act, 1854? That is the question.

It is manifest that, upon applying the above-stated facts to this subsection, the ship was clearly within the words of the sub-section: but it is argued on the part of the respondent, for the pilots, that, though this may be so, yet such was not the intention of the legislature; and this is how they proceeded to argue:—

They in the first place said that Dr. Lushington had decided under sub-s. 1 of the same section, that a ship employed in the coasting trade of the United Kingdom meant a ship *constantly* employed in that trade; and that a ship ordinarily employed in foreign trade, though de facto engaged in the coasting trade at the time the question arose, was not a vessel employed in the coasting trade of the United Kingdom within the meaning of sub-s. 1 of s. 379 of the Act of 1854. The two cases of *The Agricola* (1) and of *Lloyds* or *Sea Queen* (2) were cited in this behalf.

It is quite true that Dr. Lushington did so decide: but does this decision necessarily govern the construction of sub-s. 3? I think not. Dr. Lushington gives his reason for holding as he did as follows (3): "In my apprehension, the principle upon which vessels engaged in the coasting trade are so excepted is this. That the masters of such vessels, from their occupation and experience, are supposed to be so familiarly acquainted with the English coasts, that it would be superfluous and oppressive upon the owners to impose upon them the necessity of employing a

(1) 2 Wm. Rob. 10. (2) 1 Brown. & Lush. 359. (3) 2 Wm. Rob. at p. 17.

pilot on board." It seems to me that, although this reason may apply to sub-s. 1, relating to coasting voyages, it certainly and manifestly cannot apply to one at least of the other sub-sections, viz. 4; for, why should a stone-laden ship from Guernsey be within the exception as to having a pilot, whereas a ship not so laden is not within that exception? Moreover, how can this reason apply to an exception which opens the whole of the North Sea and Baltic to navigation without a pilot?

It seems to me, if it be necessary to give a reason for the exceptions in s. 379, that such reason is rather to be found in the endeavour to favour or foster the particular trades, and is not to be found in the reason whether the exigencies of navigation require or not a pilot to be on board.

This being so, in my judgment the words in sub-s. 3 are not to be read as meaning the constant trading to Boulogne or any place in Europe north of Boulogne, but as meaning what they say, i.e. when a ship in fact is trading to Boulogne or north thereof, and, I would add, from (and possibly to) the London district and the Trinity House outport districts, she is exempt.

The argument addressed by the pilots, that in s. 59 of 6 Geo. 4, c. 125, the word "constant" is used, and that by s. 353 of the Act of 1854 compulsory pilotage was to be enforced as theretofore, in my judgment avails nothing in the face of the fact that the word "constant" is expressly omitted in the later section, viz. 379.

I would add that, should I be wrong in the interpretation I put upon the words of s. 379, sub-s. 3, the findings in the case, especially those in paragraphs 5 and 9, shew that the *Cardiganshire* was a constant trader from London to Amsterdam and back; for it seems to me impossible to hold that the words of the sub-section mean *only* trading to Boulogne and north thereof, which must be the pilots' contention if they are correct upon their interpretation of the sub-section as applied to the facts of this case.

In my judgment the decision of the justices was erroneous, and should be reversed, with costs.

Judgment reversed.

Solicitors for appellant: *Parker, Garrett, & Parker.*

Solicitors for respondent: *Sandilands, Humphry, & Co.*

J. R.

1887
June 8;
July 9.

[IN THE COURT OF APPEAL.]

JOHNSTON AND OTHERS *v.* THE SALVAGE ASSOCIATION AND McKIVER.

Practice—Third Party Notice—Contracts of Indemnity—Marine Insurance—Policy—Suing and Labouring Clause—Order XVI., r. 48.

The defendant insured his ship under a policy containing the usual suing and labouring clause. In an action to recover for work alleged to have been done and expenses incurred by the plaintiffs for the defendant, at his request, in respect of attempting to save the ship during the continuance of the policy:—

Held (affirming the decision of the Queen's Bench Division), that the defendant was not entitled to bring in the underwriters as third parties under Order XVI., r. 48, because they did not, by the suing and labouring clause, contract to indemnify the defendant in respect of any contract made by him with the plaintiffs.

APPEAL from a decision of the Queen's Bench Division (Lord Coleridge, C.J., and A. L. Smith, J.).

Action against the Salvage Association and McKiver for work done, services rendered, and expenses incurred by the plaintiffs for the defendants at their request in respect of attempting to save the ship *Maggie Robertson* and her cargo; and also for damages against the defendants or one of them for misrepresentation, or breach of warranty of authority to employ the plaintiffs to act on behalf of the underwriters of the ship and cargo. The defendant McKiver, who was the owner of the ship, chartered her to certain railway companies in Buenos Ayres to carry a cargo of coals to South America, and effected policies of insurance, containing the usual suing and labouring clause, with the Home and Colonial Marine Insurance Company, and other firms of underwriters.

During the voyage the ship became a total loss and was abandoned, and the underwriters had long before the action was brought paid McKiver as for a total loss.

The action was first brought against the Salvage Association alone, but the plaintiffs afterwards obtained an order to join McKiver as defendants.

McKiver then applied at chambers for leave to issue and serve upon the underwriters a third party notice, under Order XVI.,

r. 48, claiming to be indemnified by them against any liability in respect of any moneys the plaintiffs might recover against him in the action, on the ground that the underwriters had agreed by the policies of insurance to indemnify him from such liability.

Manisty, J, in chambers, having made an order giving the defendant McKiver leave to issue and serve such notice, a Divisional Court rescinded the order of the learned judge.

The defendant McKiver appealed.

Bigham, Q.C. (*J. Walton,* with him), for the appellant, submitted that this was a proper case for a third party notice under Order XVI., r. 48.

Cohen, Q.C. (*Hollams,* with him), for the respondents. Order XVI., r. 48, does not apply, because there is no contract between the underwriters and the appellant to indemnify him in respect of any contract he may make with the plaintiffs. The operation of the rule is limited to cases in which the defendant has against the third party a direct right, arising from contract, to indemnity as such: *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1) The suing and labouring clause in the policies gives no such right. The issues between the defendant and the third party must be the same as between the plaintiff and the defendant.

Bigham, Q.C., in reply. The operation of rule 48 is not limited in the way suggested. It is not necessary that there should be a contract by the third party to indemnify the defendant against liability on his contract with the plaintiff. The expressions of Cotton, L.J., in his judgment in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (2) shew that the learned judge did not intend so to limit the right given by Order XVI., r. 48. He says: "Of course if A. requests B. to do a thing for him, and B. in consequence of doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequence of his doing it." Here by the effect of the suing and labouring clause the appellant must be taken to have incurred liability at the request of the underwriters. Nor is it necessary

(1) 34 Ch. D. 261. (2) At p. 272.

1887

JOHNSTON v. SALVAGE ASSOCIATION.

that the issues should be the same. Where the defendant claims an indemnity one issue must of necessity be different, namely, whether or not the third party did contract to indemnify the defendant.

Cur. adv. vult.

July 9. The following judgments were delivered :—

LINDLEY, L.J. (after stating the nature of the action). The claim of the plaintiffs, Johnston & Co., against McKiver is two-fold : viz. (1) for work and labour and expenses done and incurred by the plaintiffs for the defendant at his request; (2) for damages for misrepresentation, or breach of warranty by the defendant of his authority to act for other people in employing the plaintiffs to do what they did.

The work and labour and the expenses sued for were done and incurred by the plaintiffs in saving or attempting to save a ship and cargo. The ship was insured by the defendant with the persons sought to be introduced as third parties. The misrepresentation alleged is as to McKiver's authority to employ the plaintiffs for the underwriters.

The ship was totally lost, and was abandoned to the underwriters, and they long since paid McKiver as for a total loss. His claim against them now is based on the suing and labouring clauses in the policies, and is resisted by the underwriters.

The nature and effect of the suing and labouring clause are fully explained in *Kidston* v. *Empire Marine Insurance Co.* (1) and *Lohre* v. *Aitchison.* (2) It is in substance a contract by which the underwriter agrees to pay the assured the expense he may reasonably and properly incur in preventing a loss which, if it occurred, would fall on the underwriter under the other clauses in the policy. Such a contract is not a contract of indemnity in any proper sense ; it is a contract to pay the assured expenses which he may incur, but not to indemnify him against any claims made by other people against him. In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before

(1) Law Rep. 1 C. P. 535 ; 2 C. P. 357. (2) 4 App. Cas. 755.

seeking relief. He is entitled to be relieved from liability. But in this case McKiver would have no locus standi in equity against the underwriters if he were to seek specific performance of a contract to indemnify him against Johnston & Co.'s demand. Assuming, therefore, that the underwriters are liable to pay McKiver for services and expenses under the suing and labouring clause, and assuming that these services and expenses are included in those in respect of which Johnston is suing McKiver, I am of opinion that this case is not within Order XVI. r. 48, and that the underwriters cannot be brought in as third parties under that rule. The effect of the rule was fully considered by the Court of Appeal in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1); and the Court there laid down that the rule only applies to cases where the third party was under some obligation, by contract or otherwise, to indemnify the defendant against the demand of the plaintiff. This construction is, in my opinion, warranted by the history of the rule, by its language, and by the forms referred to in it. Whatever obligation the underwriters may be under to McKiver, they are under no obligation to indemnify him against the claims of the plaintiffs, or any of them, or any part thereof.

There is clearly no obligation on the part of the underwriters to indemnify McKiver against the consequences of any representations he may have made as to his authority to employ the plaintiffs on their behalf, or on behalf of any other person.

The appeal ought to be dismissed.

The Master of the Rolls agrees on the ground that the suing and labouring clause does not apply.

LOPES, L.J. This case raises the question as to what is the meaning and scope of Order XVI., r. 48. Does it apply to cases other than those when the third party has contracted to indemnify the defendant against a claim made by the plaintiff? Under the old rules before the recent amendment the defendant had a much larger power than under the present rule to bring in third parties against whom he might claim some relief or remedy over. The present rule was intended to curtail the old rule. Under

(1) 34 Ch. D. 255.

1887

JOHNSTON v. SALVAGE ASSOCIATION.

the present rule the defendant must make out a primâ facie case, shewing that he is entitled to *contribution* or *indemnity* against the third party. The defendant here is not entitled to contribution; he must therefore make out a primâ facie case that he is entitled to indemnity. I am of opinion that he does not make out such a case. I agree with what was laid down in the case of *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1), viz., that to bring a case within the rule there must be a direct right to indemnity as such, a right which can be enforced either at law or in equity.

Lindley, L.J., has fully stated the nature of the claim of the plaintiff against the defendants, and the other facts of the case which are material. It seems to me that whatever may be the liability of the underwriters to McKiver, the underwriters are in no way bound either at law or in equity to indemnify him against the claim of the plaintiff in this action or any part of it. There is no contract by them, either express or implied, to undertake such a liability. This case is covered by the case I have cited, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *Clements.*

Solicitors for the respondent: *Waltons, Bubb, & Johnson.*

(1) 34 Ch. D. 261.

W. A.

[IN THE COURT OF APPEAL.]

1887
Aug. 9.

MAPLE & CO. *v.* EARL OF SHREWSBURY AND TALBOT.

Practice—Money paid into Court with Denial of Liability—Order for Payment out—Order XXII., r. 6 (*c*).

Where money is paid into court with a defence denying liability, and the plaintiff does not accept it in satisfaction, an order for payment of such money out of court cannot be made until after the trial or other determination of the action.

APPLICATION for payment of money out of court.

The action was brought to recover 21,000*l.*, the balance of an account for furniture supplied. On an application by the plaintiffs for judgment under Order XIV., leave to defend was given on condition that the defendant paid 15,000*l.* to a deposit account at a bank in the joint names of the plaintiffs' and defendant's solicitors for the benefit of those whom it might concern, with liberty to either party to apply. The sum of 15,000*l.* was accordingly paid by the defendant into a bank. The defendant afterwards delivered a statement of defence, which contained paragraphs altogether denying liability, and in the alternative, a paragraph which, after stating the facts with regard to the previous payment of 15,000*l.*, stated that the defendant brought into court a further sum of 3000*l.*, and that the aggregate sum of 18,000*l.* so paid was sufficient to satisfy the plaintiffs' claim. The plaintiffs, who were not prepared to take out the 18,000*l.* in satisfaction of their claim and proposed to proceed with the action, applied to a master at chambers for an order for payment of the money out to themselves. The master referred the application to the judge at chambers, who referred it to the Court. (1)

(1) Order XXII., rule 6, sub-s. (*c*), with regard to cases of payment into court with a defence denying liability, provides as follows: "If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of the Court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is

1887

MAPLE v. EARL OF SHREWSBURY AND TALBOT.

Cock, Q.C. (*Sir R. Webster, Q.C., A.G.*, with him), for the plaintiffs in support of the application.

J. G. Witt, for the defendant. There is no jurisdiction to order payment out of court at this stage of the proceedings. The case comes under Order XXII., r. 6 (*c*), and the money can only be paid out of court in pursuance of an order. The provision is, that, if there is a balance beyond what the plaintiff "recovers," such balance "shall under such order be repaid to the defendant." Therefore no order can be made until it is ascertained what the plaintiffs are entitled to recover. The plaintiffs are seeking to read the rule as if the words in the latter part of it were "another order," instead of "such order."

GROVE, J. I feel no difficulty whatever as to the construction of Order XXII., r. 6 (*c*). That rule provides that, where money paid into court is not accepted in satisfaction, "the money shall remain in court, and be subject to the order of the Court or a judge, and shall not be paid out of court except in pursuance of an order." That means that the Court may order the money to be paid out of court in cases where it appears right that such an order should be made, for otherwise there would be no use for the words which occur in the rule. Then there is a provision for the contingency of the plaintiff going on with the action, in which case, if less than the amount paid into court is recovered, the balance, and, if the defendant succeeds, the whole amount "shall under such order be repaid to the defendant." I think the words "such order," are equivalent to "such an order," and do not necessarily refer to the same order as that previously mentioned.

In the present case I see no reason why we should not act on this view, and order this sum of 18,000*l.* to be paid out to the plaintiffs.

HUDDLESTON, B. I cannot see any difficulty in the case. There is a sum of 18,000*l.* which has been paid in to meet the

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necessary, in satisfaction of the plaintiff's claim, and the balance, if any, shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him."

plaintiffs' claim, and which is to be dealt with as provided by Order XXII., r. 6 (*c*), that is, if the action proceeds, the money is to be subject to an order, and is not to be paid out without an order, and, if it is paid out, and the plaintiff gets too much, the difference is to be repaid to the defendant. If it turns out that the plaintiffs do not recover so much as has been ordered to be paid out of court, an order is to be made for the balance to be repaid to the defendant.

I am of opinion that our order ought to be that this 18,000*l.* be paid out to the plaintiffs.

Order accordingly.

P. B. H.

Against this decision the defendant appealed.

J. G. Witt, for the defendant, contended as in the Court below.

Cock, Q.C., for the plaintiffs, contended that the Court had a discretion under Order XXII., r. 6, sub-s. (*c*), to make an interlocutory order for payment of the money out of court to the plaintiffs if they thought it just, although the plaintiffs proposed to proceed with the action and the question of liability was undetermined.

[He cited *Berdan* v. *Greenwood.* (1)]

LORD ESHER, M.R. I cannot agree with the decision of the Divisional Court. The defendant having been allowed to defend, he put in a defence which in substance amounts to a denial of liability accompanied by an alternative plea to the whole claim of payment of 18,000*l.* into court. To such a payment into court the provisions of Order XXII., r. 6, are applicable. Under that rule the plaintiffs could have taken out the money so paid in in satisfaction of the whole cause of action, and they would then have been entitled to costs up to that time; but, if a plaintiff is not willing to do that, then the rule provides that the money shall remain in court and be subject to the order of the court or a judge, and shall not be paid out of court except in pursuance of an order. I think that the order there referred to means a final order of the Court with regard to the money after the action

(1) 3 Ex. D. 251.

1887

MAPLE v. EARL OF SHREWSBURY AND TALBOT.

has been tried or in some other way disposed of, as for example by the withdrawal of the defence; for even if the defence is withdrawn, I think an order would be necessary. If the first part of sub-s. (*c*) stood alone, I should be of opinion that, as long as there is any existing defence denying liability, which remains undisposed of, there could not be an order for payment of the money out of court; but the latter part of the sub-section to my mind renders this still clearer. If the view of the Divisional Court were correct, I think the object of the rule would be frustrated and we should be driven again into all the difficulties which arose under the former practice as established by *Berdan* v. *Greenwood.* (1) I think the appeal must be allowed.

LINDLEY, L.J. I am of the same opinion. The defendant has obtained, and has availed himself of leave to defend the action. He has pleaded a defence denying liability in toto: and the question of liability so raised remains undetermined. Notwithstanding that, the Divisional Court has ordered the 18,000*l.* to be paid out to the plaintiffs. The question is whether they were right in doing so. I do not think it is essential in all cases that there should have been a trial in order that the money may be ordered to be paid out; but, as long as the question of liability remains undetermined, it seems to me that it is contrary to the terms of Order XXII., r. 6, to allow it to be paid out. That order was framed expressly to guard against mischiefs, which, if the judgment of the Court below is correct, would be revived again.

LOPES, L.J. I agree. I think that Order XXII., r. 6, sub-s. (*c*), only admits of one construction, viz. that the order therein mentioned is an order to be made after the trial or other determination of the action. It may be that the defence denying liability may be withdrawn, or that there may be a compromise, or a reference to arbitration; but I think that the order contemplated is an ultimate order to be made after the matters in issue have been finally settled or tried. The Court below seems to have thought that an interlocutory order might be made for the

(1) 3 Ex. D. 251.

payment out of the money. It seems to me that that construction really nullifies the wholesome provisions intended to be made by the rule for the purpose of remedying the difficulties which existed under the former practice. For these reasons I think the appeal should be allowed.

1887

MAPLE v. EARL OF SHREWSBURY AND TALBOT.

Appeal allowed.

Solicitors for plaintiffs: *Lumley & Lumley.*

Solicitors for defendant: *Hadden Woodward & Co.*

E. L.

[IN THE COURT OF APPEAL.]

Aug. 1.

EX PARTE PARTRIDGE.

Dentist—Dentists Act, 1878 (41 & 42 *Vict. c.* 33)—*Dentists Register—Withdrawal of Diploma of Licentiate by Medical Authority—Erasure from Register.*

Where a person has been registered under the Dentists Act, 1878, as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the dentists register under the Act.

APPLICATION for a mandamus directing the General Council of Medical Education and Registration to restore the applicant's name to the dentists register kept under the Dentists Act, 1878.

The facts were as follows:—

The applicant, H. F. Partridge, had obtained a diploma as licentiate in dental surgery from the Royal College of Surgeons, Dublin, in 1878, and his name had been subsequently entered in respect of that qualification in the dentists register kept in accordance with the provisions of the Dentists Act, 1878 (41 & 42 Vict. c. 33). In July, 1885, his diploma was withdrawn by the Council of the Royal College of Surgeons, Dublin, upon the ground of his having advertised in connection with his profession.

An applicant for a diploma from the Royal College of Surgeons, Dublin, is required to declare that, if the diploma is granted, he will not seek to attract business by advertising, or by

1887

EX PARTE PARTRIDGE.

any practice considered by the college to be unbecoming, and that he agrees that the diploma shall be cancelled on its being proved to the satisfaction of the president and council of such college that he has done so. The applicant had made such a declaration on applying for his diploma. Upon notice of the fact that his diploma had been withdrawn, the General Council of Medical Education and Registration erased his name from the dentists register under the Dentists Act, 1878. A rule nisi having been obtained for a writ of mandamus to restore his name to the register. (1)

(1) The Dentists Act, 1878, provides as follows:—Sect. 6. Any person who (*a*) is a licentiate in dental surgery or dentistry of any of the medical authorities, or (*b*) is entitled as hereinafter mentioned to be registered as a foreign or colonial dentist, or (*c*) is at the passing of this Act bonâ fide engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy, shall be entitled to be registered under this Act.

Sect. 7. Where a person entitled to be registered under this Act produces or sends to the general registrar the document conferring or evidencing his licence or qualification with a statement of his name and address and the other particulars, if any, required for registration, and pays the registration fee, he shall be registered in the dentists register. Provided, &c. . . .

Sect. 11 (1). A register shall be kept by the general registrar to be styled the dentists register; and the register shall (*a*) contain in one alphabetical list all United Kingdom dentists, that is to say all persons who are registered under this Act as having been at the passing thereof engaged in the practice of dentistry or dental surgery, and all persons who are registered as licentiates in dentistry or dental surgery of any of the medical authorities of the United Kingdom; (*b*) contain in a separate alphabetical list all such colonial dentists as are registered in pursuance of this Act; and (*c*), contain in a separate alphabetical list all such foreign dentists as are registered in pursuance of this Act. (2.) The dentists register shall contain the said lists made out alphabetically according to the surnames, and shall state the full names and addresses of the registered persons, the description and date of the qualifications in respect of which they are registered, and, subject to the provisions of this Act, shall contain such particulars as the general council shall from time to time direct. (3.) The general council shall cause a correct copy of the dentists register to be from time to time, and at least once a year, printed under their direction and published and sold, which copy shall be admissible in evidence.

Sect. 12 (1). The general registrar shall from time to time insert in the dentists register any alteration which may come to his knowledge in the name or address of any person registered. (2.) The general registrar shall erase from the dentists register the name of every deceased person. (3.) The general registrar may erase from the dentists register the name

Kennedy, Q.C., and *Muir McKenzie*, shewed cause.
Finlay, Q.C., and *Lyon*, supported the rule. (1)

Cur. adv. vult.

June 15. The judgment of the Court (Mathew, J., and A. L. Smith, J.) was delivered by

MATHEW, J. This was a rule for a mandamus to the General Council of Medical Education and Registration of the United Kingdom to restore the name of H. F. Partridge to the register of dentists which the council are directed to keep under the Dentists Act, 1878 (41 & 42 Vict. c. 33). The applicant had since the year 1867 practised in the metropolis as a dentist, and it was

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of a person who has ceased to practise but not (save as hereinafter provided) without the consent of such person. . . .

Sect. 13. The general council shall cause to be erased from the dentists register any entry which has been incorrectly or fraudulently made. Where a person registered in the dentists register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in Her Majesty's dominions or elsewhere, of an offence which, if committed in England, would be a felony or misdemeanor, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register. The general council may, and upon the application of any of the medical authorities shall, cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section, and on proof of such conviction or of such infamous or disgraceful conduct shall cause the name of such person to be erased from the register: provided that the name of a person shall not be erased under this section on account of his adopting or refraining from adopting the practice of any particular theory of dental surgery, nor on account of a conviction for a political offence out of Her Majesty's dominions, nor, &c. . . . . Any name erased from the register in pursuance of this section shall also be erased from the list of licentiates in dental surgery or dentistry of the medical authority of which such person is a licentiate.

Sect. 15. The general council shall, for the purpose of exercising in any case the power of erasing or restoring to the dentists' register the name of a person or an entry, ascertain the facts of such case by a committee of their own body not exceeding five in number, of whom the quorum shall be not less than three, and a report of the committee shall be conclusive as to the facts for the purpose of the exercise of the said powers by the general council. The general council shall from time to time appoint, and shall always maintain, a committee for the purposes of this section, and, &c.

(1) The arguments were substantially the same as those subsequently used in the Court of Appeal.

1887

Ex parte Partridge.

Mathew, J.

admitted that when the Act passed he would have been entitled to be registered as a dentist if an application had been made by him in accordance with the provisions of s. 7. He had not, however, applied for registration in respect of this qualification.

In the year 1878, Mr. Partridge obtained from the Royal College of Surgeons, Ireland, a diploma in dentistry, and as a licentiate of this body, which was one of the medical authorities referred to in the Act, he applied for and procured registration under the statute, s. 6. He had thus become entitled to the important privileges secured to registered practitioners in dentistry; see ss. 3, 5, and 7. The diploma had been granted on the terms that the holder should not seek to attract business by advertising or by any practice considered by the college to be unbecoming, and that the diploma might be cancelled on its being proved to the satisfaction of the president and council that he had done so. In the year 1885 the Royal College of Surgeons of Ireland, upon the ground that Mr. Partridge had advertised for business, cancelled his diploma, and thereupon the general council directed his name to be erased from the register. The 11th section of the Act contains provisions as to the contents and form of the register and as to corrections to be made in it from time to time.

It was argued for the general council that the original qualification no longer existed. The council were bound to correct the register and to erase the name as if there never had been a qualification. On the other hand it was argued for the applicant that the name of a person qualified either by practice or diploma, when once properly placed on the register, could only be erased in the manner and upon the grounds specified in the statute. It was argued that the mere fact that the diploma had been cancelled by the medical authority, which had granted it, was not a ground upon which the general council was justified in disqualifying the applicant or exposing him to the penalties imposed by the Act upon unqualified practitioners. We are of opinion that the contention of the applicant is right and that he is entitled to have his name restored. Provisions as to the removal of a name are contained in the 12th and 13th sections of the Act, and the latter section is that which applies to the case. It is unnecessary to read the section. The mode of exercising the powers conferred

by this section is pointed out by s. 15, which provides that the council shall appoint a committee of their body to ascertain the facts of each case. It appears to us that in such a case as the present the medical council possessed no further powers of dealing with the register than those conferred in the sections referred to. It was admitted that the council had not decided that Mr. Partridge had done anything to justify the removal of his name under s. 13, but had considered that they were bound to erase his name when the determination of the medical authority granting the diploma had come to their knowledge. But this is a course which it seems to us they were not entitled to adopt; otherwise it would seem that, where a medical authority had withdrawn a diploma on the ground for instance that a particular theory of dental surgery had been adopted or discarded, the name of the holder must be struck from the register. But this is a ground upon which the general council under s. 13 are expressly prohibited from erasing a name. The 3rd clause of the 13th section appears to shew that the council was not intended to be bound by any determination of the medical authority, even with respect to the grounds for erasing a name specified in s. 13, but was required to adjudicate independently. This view is strengthened by an examination of the provisions in the last clauses of ss. 13 and 14, where it is provided that the medical authority shall be bound by the decision of the council. But there is no provision that the council shall be bound by the decision of the medical authority. It is also deserving of notice that the Dentists Act, 1878, contains no similar provision to that of the Medical Act of 1858, which empowers the council, if they see fit, to erase from the register the name of a practitioner struck off the list of the medical authority. The Dentists Act, 1878, appears to be carefully framed to restrict the right of the general council to interfere with registered dental practitioners in the practice of their profession to the cases where there are the grave reasons for disqualification which are specified in s. 13. The rule must be made absolute with costs.

The General Council appealed against the order of the Divisional Court.

1887

EX PARTE PARTRIDGE.

Aug. 1. *Kennedy, Q.C.*, and *Muir McKenzie*, for the appellants. It cannot have been intended by the Dentists Act, 1878, that a person should be entitled to be on the register, when the qualification is gone upon which his title to be registered depended. The 11th section of the Act provides that the register to be kept shall contain (inter alia) all persons who are registered as licentiates in dentistry or dental surgery of any of the medical authorities of the United Kingdom, and the 2nd sub-section provides that it is to state the date of the qualification. It is contended that this must mean persons who continue to be licentiates of the various authorities, and the date of an existing qualification. If the register stated the name of a person who had ceased to be a licentiate of a medical authority, and therefore had no qualification, it would be incorrect and misleading to the public. It is true that there is no express provision for the erasure of the names of persons who, having been registered as licentiates of a medical authority, have ceased to be such licentiates, although there are express provisions as to erasure from the registry in certain cases mentioned in ss. 12 and 13; but it is contended that it is obviously meant that the register shall be correctly kept, and therefore by necessary implication there is a power of erasure where the person has lost his title to be registered. It was not necessary to provide expressly for that case.

[LORD ESHER, M.R. That argument begs the question whether the title to be on the register depends on the continued existence of the qualification in respect of which the person was originally put on the register. The scheme of the Act does not seem to be that a fresh register is to be from time to time made up; the 11th section provides for corrected copies being from time to time issued, treating the register as a continuing register. The question is whether a person who has been once put on the register is intended to be subject to removal in any other cases than those specified in the Act.]

It is contended that the object of the statute is not to create a qualification, but merely to give a correct list of persons possessing qualifications aliunde in various ways. The result of holding otherwise would be that persons who have obtained diplomas subject to conditions which the medical authorities have a right

to impose under the powers contained in their charters, as being necessary for the well being and honour of their profession, may, as soon as they are registered under the Dentists Act, 1878, trample on those conditions.

Finlay, *Q.C.*, and *Lyon*, for the respondent, were not called upon.

LORD ESHER, M.R. In this case the applicant for the mandamus was in 1878 a licentiate in dental surgery of the Royal College of Surgeons in Dublin, and in respect of that qualification he was put on the register established by 41 & 42 Vict. c. 33. Since then, in consequence of a breach by him of the undertaking he entered into with the authority by whom he was licensed, such authority revoked his licence. For that reason, and for that alone, the general medical council have erased his name from the register. They have not exercised or affected to exercise any jurisdiction under ss. 13 and 15 of the Act, but, as a mere consequence of the fact that he is no longer a licentiate of the Royal College of Surgeons in Ireland, they have treated him as no longer entitled to be on the register. The question whether they were right in so doing depends upon the true construction of the 41 & 42 Vict. c. 33. The 6th section of that Act provides, that "any person, who" (among other things) "is a licentiate in dental surgery or dentistry of any of the medical authorities, shall be entitled to be registered under this Act." It seems to me that that section is dealing with the moment of time when the person is to be put on the register. The words "entitled to be registered" must mean either "entitled to be put on," or "entitled to be kept on the register." It appears to me that their natural meaning under ordinary circumstances would be "entitled to be put on the register." But I think that the provisions of s. 7 are strong to shew that this is the meaning. That section provides, that "where a person entitled to be registered under this Act produces or sends to the general registrar the document conferring or evidencing his licence or qualification, with a statement of his name and address and the other particulars, if any, required for registration, and pays the registration fee, he shall be regis-

1887

Ex parte Partridge.

Lord Esher, M.R.

tered in the dentists register." The words "entitled to be registered" there clearly mean "entitled to be put on the register." The things which are required to be done by this section in order to procure registration under s. 6 are to be done once for all, and apply only to the time when the person is to be put on the register. He is not required, for instance, to pay an annual fee to the registrar, but one fee once for all. It seems to me that this construction gets rid of the appellants' best point, viz., that which was made upon the phraseology of s. 11. That section provides, that "the register shall contain in one alphabetical list all United Kingdom dentists, that is to say, all persons who are registered under this Act as having been at the passing thereof engaged in the practice of dentistry or dental surgery" (which latter words can only apply to the time of first putting on the register) and "all persons who are registered as licentiates in dentistry or dental surgery of any of the medical authorities of the United Kingdom." Those words are quite satisfied by treating them as referring to the time of first putting the registered persons on the registry under the Act. The section goes on to provide that the register shall state the date of the qualifications in respect of which the registered persons are registered. If the register is one to be made once for all, it seems to me that the date which it is to give must be the date of the qualification in respect of which the registered person is originally registered, and that it does not necessarily mean the date of a qualification which continues to exist. Sub-s. 3 provides that the general council shall cause a correct copy of the dentists register to be from time to time, and at least once a year, printed under their direction and published and sold. That provision would be necessary in any view, because there must be constant additions to the register under the Act, and there would be erasures under the provisions of s. 13. But it does not shew that there is to be a fresh register year by year. So far there is no provision for any dealing by any body with the register except in regard of the original function of registration. But then by s. 12 the registrar is given certain powers of erasure in regard to deceased persons and persons who have ceased to practise: and by s. 13 it is provided that the general council

shall cause to be erased from the dentists register any entry which has been incorrectly or fraudulently made therein, and that, where a person registered in the dentists register has either before or after the passing of the Act, and either before or after he is so registered, been convicted, either in her Majesty's dominions or elsewhere, of an offence which, if committed in England, would be a felony or misdemeanor, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register.

The general council are by the section, upon the application of any of the medical authorities, to cause inquiry to be made into the case of any person alleged to be liable to have his name erased under the section, and the mode in which such jurisdiction is to be exercised is pointed out by s. 15, which provides for ascertaining the facts of the case by a committee, whose report is to be conclusive as to the facts for the purpose of the exercise of the said powers by the general council. Where the person is proved to have been convicted or to have been guilty of infamous or disgraceful conduct, under s. 13 the council are to cause his name to be erased from the register, and any name so erased is to be erased from the list of licentiates of dental surgery or dentistry of the medical authority of which such person is a licentiate. It seems to me that these provisions go to shew that the power of erasure by the council is in the nature of a judicial power, and must be confined to the matters into which they are authorized to inquire for the purpose of exercising such power. It may be that the local or more limited medical authority may strike a man off their register for a breach of an undertaking on which he obtained his qualification. But upon the true construction of this Act I think we are bound to say that the mere fact that a medical authority has struck a person's name off their register of licentiates does not authorize the erasure of his name by the general council from the register under this Act in the absence of any exercise by the council of the judicial powers given to them by s. 13. The dentists register is a novel institution, the creature of the Act of 1878, and it seems to me that there can be no powers of dealing with the register so created except those which are given by the Act. But, although I come

1887

EX PARTE PARTRIDGE.

Lord Esher, M.R.

to the conclusion that the mere fact that the registered person has been struck off the list of licentiates of a medical authority does not entitle the general council to erase him from the dentists register, yet I think I ought to state that in my opinion the council would have jurisdiction under s. 13 if they thought on inquiry that the registered person had broken the condition on which his license was obtained in such a way and under such circumstances as that he had been guilty of disgraceful conduct in a professional respect, which might be the case if they found that such breach of his undertaking was of a deliberate and systematic character. For these reasons I think the appeal must be dismissed and the mandamus must issue, but the fact of its so issuing must not be considered as preventing the council from exercising any jurisdiction they have over the matter if brought before them under s. 13 of the Act.

LINDLEY, L.J. I am of the same opinion. The case is one of great importance, particularly to the various medical authorities described in s. 1 of the Act of 1878. The effect of our decision is that it will not be competent for the general council, without exercising their jurisdiction under s. 13, and simply because a licentiate of a local medical authority has been struck off the register of that authority, to erase his name from the dentists register. Whether this result was actually intended by the legislature I cannot say. It seems curious that the Act of 1878 should contain no provisions analogous to that of s. 28 of the Medical Act, 1858 (21 & 22 Vict. c. 90). The consequence is that the various authorities have less power over dentists than over other medical men. The question seems to me to turn principally upon ss. 6, 7, and 11 of the Act. It appeared to me at first a strange thing to say that a person who, not being a licentiate, would not be entitled to be registered, is nevertheless entitled to be on the register. But the answer is to be found in the true meaning of the expression "entitled to be registered" as used in the Act. That expression in s. 6, read by the light of the provisions of s. 7, seems to me to mean "entitled to be put on the register in the first instance." The true construction of the Act appears to me to be this: there are certain provisions

which regulate the function of registering persons and certain provisions which regulate the removal of persons from the register. The provisions which regulate the removal of persons from the register are to be found in ss. 12 and 13. Sect. 12 provides for the erasure of the names of deceased persons and persons who have ceased to practise. Sect. 13 authorizes the council to erase the names of convicted persons and those guilty of infamous or disgraceful conduct in a professional respect. There is no provision which enables the council to remove the name of a person once on the register simply because he has been struck off the register of licentiates of the body which originally licensed him. That being so, I think the mandamus must go, without prejudice however to the jurisdiction of the council under s. 13 if they should be of opinion that the facts bring the case within that section.

LOPES, L.J. I also think that the true construction of the Act is, that, when a person's name is once placed on the register, it cannot be removed, unless the case is brought within ss. 12 or 13, and that it cannot be removed merely because the person has lost the qualification in respect of which he was originally entitled to be registered. Therefore it seems to me that the order directing the mandamus to issue was right. I desire to add that in my opinion it is clearly still open to the council to exercise their jurisdiction under ss. 13 and 15, if it should be shewn to them that there is a case within those sections; and, if in such a case they found that a person had acted wilfully and deliberately in violation of an undertaking upon the faith of which he obtained his license, I should suppose they would have little hesitation in coming to the conclusion that he had been guilty of disgraceful conduct in a professional respect. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Warren, Gardner, & Murton.*
Solicitor for respondent: *Calkin Lewis.*

E. L.

1887
April 19.

ADDY, APPELLANT; BLAKE, RESPONDENT.

Licensing Acts—Intoxicating Liquor—Sale of, in marked Measure—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 8.

By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed to him. The customer could not see the beer drawn, and never saw it while in the measure. The publican having been convicted of an offence under s. 8:—

Held, that the sale was not complete until the beer was handed to the customer, that the beer was not sold in a marked measure as required by the statute, and that the conviction was right.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information was preferred by the respondent, a superintendent of police and inspector of weights and measures, against the appellant, an innkeeper, for unlawfully selling by retail, and not in cask or bottle, certain intoxicating liquor, to wit, beer, in a quantity not less than half a pint, which beer was not sold in a measure marked according to the imperial standards, contrary to the provisions of s. 8 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) (1). On September 30, 1886, the respondent went to the appellant's inn, and having seated himself in a chair in the parlour, ordered the appellant to serve him with a pint of beer, and the appellant thereupon left the room for the purpose of executing the order. Shortly afterwards the appellant returned with an earthenware jug filled with beer, which he handed to the respondent, who then paid the appellant the price. The jug in which the beer was supplied to the respondent was not in any way stamped or marked as a measure.

(1) By s. 8 of the Licensing Act, 1872 (35 & 36 Vict. c. 94): "Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards."

"Every person who acts . . . . in contravention of this section shall be liable to a penalty. . . ."

1887

ADDY v. BLAKE.

It was proved by witnesses for the appellant that, on leaving the parlour, he entered the bar (an adjoining room), and there drew the beer into a properly stamped pint measure, and then poured the contents of the measure into the jug, which, together with an unstamped glass tumbler, he subsequently carried into the parlour, and handed to the respondent. From the position in which the respondent was sitting in the parlour it was impossible for him to see the appellant either draw the beer into the measure or pour it from the measure into the jug, and he was not in fact aware that any measure had been used by the appellant. The justices convicted the appellant, on the ground that the beer had not been placed in a duly stamped measure in the presence or to the knowledge of the customer, and on the further ground that the sale was, under the circumstances, incomplete until the beer had been handed to the respondent and paid for by him. The question for the opinion of the Court was whether the appellant was rightly convicted.

Lockwood, Q.C. (*Newson,* with him), for the appellant. There is nothing in s. 8 of the Act of 1872 to compel the innkeeper either to draw or to measure the beer in the customer's presence. The repealed Act, 3 Geo. 4, c. 77, which is analogous to and explanatory of the Act of 1872, required by s. 20 that the beer should be measured in a stamped measure in the presence of the customer, but the Act of 1872 contains no such requirement. It is sufficient to satisfy the section if the beer is in fact drawn into a properly stamped measure, and this was done by the appellant.

Forbes, Q.C. (*C. M. Atkinson,* with him), for the respondent, was not called upon.

A. L. SMITH, J. I am of opinion that the justices were right. The respondent asked for a pint of beer, and the appellant left the room and went into the bar to draw it for him, and on his return handed it to the respondent in an unstamped jug. It is found in the case that the respondent could not have seen the appellant draw the beer, and that he was not aware that a stamped measure was used by him to draw it into. What was done did not amount to a "sale" in a stamped measure, which is

1887

ADDY v. BLAKE.

the obvious requirement of s. 8 of the Act of 1872. It is true that the appellant appears to have drawn the beer into a marked pewter pot, but he then turned it into an unstamped earthenware jug, in which he sold it. Neither of these acts was done by the appellant in the presence of the respondent, who had no opportunity of seeing the beer in a measure at all, and could not tell what quantity was being served to him. The appeal must be dismissed.

WILLS, J. I entirely concur. The beer was sold when it was placed before the respondent for him to take it, and not till then. The resources of evasion are fertile, and we should fritter away the benefit that the Act was intended to confer if we allowed this appeal.

Appeal dismissed.

Solicitors for appellant: *E. Doyle & Sons, for Binney & Son, Sheffield.*

Solicitors for respondent: *Badham & Williams, for W. L. Williams, Wakefield.*

W. J. B.

THE QUEEN (ON THE PROSECUTION OF THE BRITISH GASLIGHT COMPANY, LIMITED) *v.* THE RECORDER OF HANLEY.

1887 *July* 6.

Gasworks—Gasworks Clauses Act, 1847 (10 *Vict. c.* 15), *s.* 35—*Inquiry into State and Condition of Concern—Jurisdiction of Quarter Sessions—Power to re-open Accounts of previous years—Costs of Inquiry.*

By s. 35 of the Gasworks Clauses Act, 1847, a court of quarter sessions may, on the petition of two gas-rate payers, appoint some accountant, or other competent person, to examine and ascertain at the expense of the gas company (the amount of the expense to be determined by the Court) the actual state and condition of the concerns of the company, and to make a report thereof to the Court, and power is given to the Court to examine witnesses on oath touching the truth of the said accounts and the matters therein referred to; and if it appear to the Court that the profits of the company during the preceding year have exceeded the prescribed rate, the Court has power, in case the whole of the reserve fund has been and remains invested, and in case dividends to the amount thereinbefore limited have been paid, to make an order reducing the price of the gas supplied by the company.

A petition was under the above section presented to the recorder of Hanley praying him to appoint a person to inquire into the actual condition of the undertaking of the prosecutors, and an accountant was appointed. During the inquiry he examined not only the accounts of the then previous year, but re-opened all the accounts of previous years to 1871, and a report based upon this inquiry was sent in by him to the recorder. It was admitted that the whole of the reserve fund was not then and never had been invested, and that the prescribed maximum dividend had not been paid. The recorder, being of opinion that the accounts when amended shewed that the company had in point of fact earned enough to pay the prescribed maximum dividend, and to have invested and kept invested the whole of the reserve fund, made an order reducing the price of gas 6*d.* per 1000 cubic feet. He further ordered the prosecutor to pay 650*l.* the expense of the proceedings before the accountant, and to pay to the petitioners 2433*l.* 6*s.* 6*d.*, "their costs of and incident to the petition." Upon an application for a writ of certiorari to quash the order as being made without jurisdiction:—

Held, that the order to reduce the price of gas was bad, the power of the recorder being absolutely restricted by s. 35 to cases where the whole of the reserved fund has been invested and the prescribed dividend paid; and that the recorder acted without jurisdiction in ordering the costs of the petitioners to be paid by the prosecutors.

Per Curiam. The accountant and the recorder had jurisdiction to inquire into the accounts of past years for the purpose of ascertaining the actual condition of the concern; but *semble*, that they had no power to disallow and re-cast them, and by so doing vary the accounts of the year into which they were inquiring.

RULE calling upon the recorder of Hanley to shew cause why a writ of certiorari should not issue to remove into the Queen's

1887

THE QUEEN v. RECORDER OF HANLEY.

Bench Division an order made by him reducing the price of gas furnished by the British Gas Light Company, Limited, in the borough of Hanley, and further ordering the said company to pay the costs of an inquiry held under s. 35 of the Gasworks Clauses Act, 1847. The facts of the case and the arguments of counsel are fully set out in the judgment.

Sir R. E. Webster, Q.C., A.G., and *Bosanquet, Q.C.* (*Alfred Young*, with them), shewed cause.

Sir Horace Davey, Q.C., and *Balfour Browne, Q.C.* (*Boddam*, with them), for the prosecutors in support of the rule.

July 6. The judgment of the Court (Lord Coleridge, C.J., and Denman, J.) was delivered by

DENMAN, J. This was a rule nisi for a certiorari to the recorder of Hanley to remove in order to be quashed an order made by him on February 11, 1887, whereby he ordered that the British Gas Light Company, Limited, should make a reduction of 6*d.* per 1000 cubic feet in the rate for gas thereafter to be furnished by them, so as to reduce the rate to 3*s.* per 1000 feet, and pay 650*l.*, the expenses of one Carter in examining and ascertaining the state and condition of the concerns of the said company, and also pay the petitioners in the order referred to the sum of 2433*l.* 6*s.* 6*d.* their costs of and incident to the said petition.

The case turned mainly upon the true construction of the 35th section of the Gasworks Clauses Act, 1847 (10 Vict. c. 15). The British Gas Light Company, Limited, was, as appears by the recitals in a private Act of Parliament, 21 Vict. c. xxxiii., established in 1824 for the purpose of manufacturing and supplying gas in cities, towns and other places. Subsequently, before 1858, the company was incorporated with limited liability under its present name, and established gasworks in several places in the Potteries, including Hanley.

In 1858 the company obtained the Act of 21 Vict. c. xxxiii. giving it additional powers within certain limits in Staffordshire including the borough of Hanley, and by s. 3 of that Act the Gasworks Clauses Act, 1847 (10 Vict. c. 15) was incorporated, save in so far as any of the provisions of that Act might be

expressly modified by the new Act. The Act contains no provision modifying the provisions of s. 35 of the Gasworks Clauses Act, 1847. The Act of 1858 by s. 15 after reciting that 42,610*l.* had been expended by the company on land, buildings, works and apparatus for supply of gas within the limits of the Act, provides that a separate account shall be kept of that sum and of all sums to be expended on similar objects, and goes on to enact as follows: "The provisions of the Gasworks Clauses Act, 1847, with respect to the amount of profit to be received by the company shall, as regards the profits which may accrue to the company from the supply of gas within the limits of this Act, be applicable to the said sum of 42,610*l.* and such other sums, &c., which several sums shall, for the purpose of estimating such last mentioned profits, be deemed to be the paid-up capital applicable to the objects and purposes of this Act, according to the intent, &c., of the Gasworks Clauses Act, 1847: Provided, nevertheless, that the capital to be expended by the company for the purposes of this Act shall not exceed 30,000*l.* in addition to the 42,610*l.*, and the profits to be divided by the company upon the capital expended for the purposes of this Act shall not exceed 10*l.* per cent. per annum in respect of the 42,610*l.*, nor 7*l.* 10*s.* per cent. in respect of so much of the 30,000*l.* as shall from time to time be actually expended." Then followed several clauses relating to the price of gas, its quality and the testing of it, which were repeated by a subsequent Act of 1866 to be presently referred to, and other provisions not material to the present case.

By the Act of 1866 (29 & 30 Vict. c. cxix.), which is entitled "An Act to alter and amend certain provisions of the . . . Act" of 1858, the clauses of the Act of 1858 relating to price of gas are repealed, and by s. 5 it is provided that the maximum charge for gas supplied within the limits of the Act should be 3*s.* 6*d.* per 1000 feet. No other provision of that Act need be stated, except that in s. 28, to which it will be necessary to refer at a later stage. By a subsequent Act (43 & 44 Vict. c. cxx.) the company were empowered to enlarge their works and to expend 50,000*l.* in addition to the 42,610*l.* and 30,000*l.* already expended, of which 50,000*l.* the sum of 40,000*l.* and no more was to be expended out of the capital stock of the company, and a sum not

1887

THE QUEEN v. RECORDER OF HANLEY.

Denman, J.

exceeding 10,000*l.* might from time to time be borrowed on mortgage. The profits to be divided in respect of this 40,000*l.*, and the interest on the sums borrowed on mortgage, not to exceed 5 per cent. By s. 6 of the Act, the Gasworks Clauses Act, 1871, was to apply to the undertaking as if it were authorized by the Act, and by s. 9 it was provided that notwithstanding anything in s. 28 (providing for publication, &c., of annual accounts) of the Act of 1866 or in the schedule to that Act, the accounts to be made up by the company in pursuance of that Act should be made up in accordance with the provisions of the Gasworks Clauses Act, 1871.

By the Act of 1871 (34 & 35 Vict. c. 41), s. 35, the company are to forward to the local authority on or before March 25 in each year an annual statement of accounts made up to December 31 then next preceding as near as may be in the form and containing the particulars specified in the Sched. B. to that Act. Sched. B. contains a number of forms headed from A. to I. respectively.

Sect. 35 further provides that the Board of Trade with the consent of the company may alter the forms for the purpose of adapting them to the circumstances of the undertaking, and of better carrying into effect the objects of that section. The company had in the present case annually forwarded accounts in the form sanctioned by the Board of Trade.

The proceedings which gave rise to the present rule were as follows:—

At the quarter sessions for the borough of Hanley held on July 2 and 3, 1885, certain gas-rate payers presented a petition under s. 35 of the Gasworks Clauses Act, 1847, complaining of the accounts of the company for the year ending June, 1884, and praying "That the Court would appoint an accountant or other competent person to examine and ascertain the actual state and condition of the concerns of the company, and that the Court would thereupon make such order and give such relief as to the Court should seem fit." Upon that petition the recorder appointed Mr. Carter in the terms of the petition, and after a long inquiry he on April 8 presented his report. It is unnecessary to state the effect of this report in detail; but he states that in order to ascertain the correctness of the accounts he had found it neces-

sary not to confine his examination to the accounts of the year ending June 30, 1884, but to investigate the accounts of previous years. And he repeats that he did in fact extend the investigation as far back as 1871, in order to discover whether sums had in former years been improperly charged against revenue, and he then proceeds to correct the account for the year ending June 30, 1884, after re-opening more or less all the accounts from 1871, and pointing out what he conceives to be errors in the mode of dealing with the several items going to make up those accounts.

It is unnecessary to state more in detail the contents of Mr Carter's report, because the question before us is not whether he acted erroneously, but whether the recorder has exceeded his authority in the judgment he has pronounced. It was contended that he had, on several grounds. The objections raised, though stated much more voluminously in the rule, resolve themselves into the following: (1.) That the recorder had no jurisdiction to re-open the accounts of previous years duly delivered in accordance with the forms prescribed in the Acts, and treated as settled accounts, but was confined to an inquiry into the correctness of the accounts for the year ending June 30, 1884, and bound to assume the correctness of past accounts, and to find upon that assumption what was the profit made in that year for the purpose of judging whether it was in excess of the provisions of the existing law. And that inasmuch as in fact the reserved fund had not been invested nor the full dividend prescribed by the Act paid, the recorder had no authority to order a reduction in the price of gas.

(2.) That it was no part of the duty of the recorder to inquire into the judiciousness or injudiciousness of the company in the management of the concern, or the sums paid by them for keeping up the manufacture and supply, with the view of ascertaining whether the concern might have made a profit larger than that actually made.

(3.) That the recorder had gone beyond his jurisdiction in disallowing and carrying to the revenue account for the year 1884 the annual amount deducted for depreciation and the amount laid by for an insurance fund.

1887

THE QUEEN v. RECORDER OF HANLEY.

Denman, J.

(4.) That the order of the recorder was bad, being an order for a reduction of the price of gas to 3*s.* per 1000 cubic feet unlimited in point of time.

(5.) That the judgment was wrong in ordering the company to pay the costs of the petitioners of or incident to their petition.

With regard to the first objection there can be no doubt that the report of Mr. Carter and the judgment of the recorder are based upon a complete re-opening of all the accounts of the company for many years antecedent to those of the year ending June 30, 1884. After stating the contention of the petitioners to be "that the respondents had *each year* made improper and illegal payments, and improper and illegal entries, and that considerable portions of the revenue had been misappropriated *in past years*," he goes on to say "I have found many of the respondents' figures inexact and misleading. I have thought it right to pursue the inquiry until I got as nearly as possible at the true figures and the real state of things. This could only be done by striking out the figures which were untrue or which ought not in point of law to appear there, and by amending the errors in the accounts so that when the true figures stand properly marshalled they may represent the real state of the respondents' concerns. I understand the scope of my powers to extend so far, though if I am wrong on this point the position taken up by the respondents is impregnable, and no order to reduce the price of gas supplied by them can be made." It is quite clear from the whole judgment that he did in fact strictly canvass the accounts of the four years preceding, and came to the conclusion that certain charges claimed by way of reduction of the profit were improperly charged during those and many preceding years, and after correcting the accounts upon that footing, came to the conclusion that because in his judgment the profits made out *ought* to have been larger than they were, he was justified in ordering a reduction.

The two main items upon which this view was brought to bear were an annual charge for depreciation and an annual item for insurance. It was pointed out by the company's counsel that both these charges were named in the form given in the schedule to the Act of 1866, and it also appears from the report of

Mr. Carter that the accounts were in the form sanctioned by the Board of Trade. But it is not necessary to pursue this question further, for the question is not whether the recorder has rightly or wrongly decided, but whether he has gone beyond his jurisdiction by re-opening accounts over which by the Act he had no control, or by ordering a reduction in the price of gas in a case where in fact the reserve fund had not been invested nor the prescribed dividends paid, on the ground that if in former years the accounts had been properly kept the prescribed dividends might have been paid and the reserve fund invested.

On one ground, which I will presently explain, I have come to the conclusion that he has exceeded his jurisdiction. Before referring to the section under which the proceeding in the present case was taken, it is right to refer to some other provisions of the Act of 1847. By s. 30, it is provided that the profits to be divided in any year shall not exceed the prescribed rate unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate. Then by s. 31 it is provided that if the profits in any year amount to a larger sum than is sufficient after making up any deficiency in any previous year to make a dividend at the prescribed rate, the excess is to be invested, and also its interest; and the two are to accumulate at compound interest until they reach a prescribed sum, or 10 per cent. of the nominal capital, which sum is to form a reserved fund to meet any deficiency in the profits or an extraordinary claim, the latter to be certified (s. 32) by two justices.

By s. 33, when the required sum is reached the interest is to be no longer invested, but applied to the general purposes of the company. By s. 34 if in any year the profits divisible do not amount to the prescribed rate, the dividend is to be made up by drawing upon the reserved fund from time to time.

Then follows s. 35, the clause upon which the present question is raised. After providing that the court of quarter sessions may, on the petition of two gas rate-payers, nominate and appoint some accountant or other competent person to examine and ascertain at the expense of the undertakers (the amount of such expense to be determined by the said Court) the actual state and condition

1887

THE QUEEN v. RECORDER OF HANLEY.

Denman, J.

of the concerns of the undertakers, and to make report thereof to the said Court, it enacts as follows:—"And the said Court may examine any witnesses touching the truth of the said accounts, and the matters therein referred to; and if it appear that the profits of the undertakers for the preceding year have exceeded the prescribed rate, the undertakers shall in case the whole of the said reserved fund has been and then remains invested as aforesaid, and in case dividends to the amount hereinbefore limited have been paid, make such a rateable reduction in the rate for gas to be furnished by them as in the judgment of the said Court shall be proper, but so as such rates when reduced shall insure to the undertakers, regard being had to the amount of profit before received, a profit as near as may be to the prescribed rate." By s. 37 a heavy penalty is imposed upon the undertakers if they do not produce to the Court or to the accountant any books of account or other books, bills, receipts, vouchers, or papers relating to the pecuniary affairs of the undertakers. Sect. 38 then provides for the keeping of an account to be sent annually to the clerk of the peace.

Taking into account the whole of these provisions, we do not come to the conclusion that the accountant or the recorder went beyond their province merely because they examined into the accounts of years previous to that ending June 30, 1884. It might be absolutely necessary to do this in order to ascertain and report upon the actual state and condition of the concerns of the undertakers within the meaning of s. 35. Moreover, we think that the words "the said accounts," into the truth of which the recorder is to inquire, though an inaccurate expression, because no accounts had previously been mentioned, are intended to refer not only, if at all, to any account prepared by the accountant, but to the accounts of the company required by the subsequent s. 38, and by any provisions of the company's special Acts.

But though we think that the accountant might so inquire and report upon any inaccuracy in the accounts of former years throwing light upon the actual state and condition of the concern, and though we think that the recorder might do the same in order to enable him in a proper case to order the price of gas to be reduced, we feel bound to hold that the recorder here has made

such an order without jurisdiction, by disregarding the limitation of his power to make any such order contained in s. 35. The words are, "If it appear to the Court that the profits of the undertakers for the preceding year have exceeded the prescribed rate, the undertakers shall, in case the whole of the reserved fund has been and remains invested as aforesaid, and in case dividends to the amount hereinbefore limited have been paid, make such a rateable reduction, &c., as in the judgment of the said Court shall be proper."

Now it appears on the face of the judgment of the recorder that, in fact, neither had the whole of the reserve fund been invested, nor the whole of the prescribed amount of dividends paid. He expressly states the fact to be so. He then proceeds to put an interpretation upon the statute which we think it is incapable of bearing, viz. that a rateable reduction in the price of gas may be ordered by the Court when "the undertakers have drawn from the profits of the undertaking during its career enough to have paid all dividends and all other liabilities, and also to have invested and kept invested the whole of the reserve fund." This seems to us to amount to an alteration of the law in order to give himself jurisdiction in the particular case. The order drawn up is altogether silent upon the point. If it had stated the facts as they are stated in the judgment, it would have shewn on the face of it that it was made without jurisdiction. It is probably bad for the want of any statement on the subject, but this point has not been much argued, and we give no opinion upon it. But we think it clear that in fact the learned recorder has made an order without jurisdiction, owing to the absence of a state of things which the statute requires to exist before any such order can be made, and has so construed the Act as to substantially make a different law from that enacted by the legislature, and that he has done this in a matter which goes to the root of his jurisdiction. Possibly the objections of the company raised by others of the points above mentioned ought to prevail, for though the accountant and the recorder might be bound to inquire into previous accounts for the purpose of ascertaining the actual condition of the concern, it does not follow that when accounts have been properly delivered and remained unquestioned for years, s. 35 would allow a recasting and disallowance

1887

THE QUEEN v. RECORDER OF HANLEY.

Denman, J.

of those accounts for the purpose of arriving at the proper result as regards the questions before the recorder in an inquiry such as that contemplated by s. 35. Again, the recorder's view as to the illegality of the charges for depreciation and insurance seem open to question; but we rest our judgment on what appears to be a matter clearly going to the jurisdiction to make such an order, in preference to inquiring into objections which raise very nice questions whether the points decided by the recorder were decisions of law, or findings of facts within his jurisdiction. There is one point, however, upon which it is necessary to give an opinion. By s. 35 the expenses of the proceedings of the accountant are to be borne by the company, and the amount to be determined by the Court. The recorder has ascertained that amount at 650*l.*, and there is no objection to his order in that respect. But he has also ordered that the company pay the petitioners the large sum of 2433*l.* 6*s.* 6*d.*, "their costs of and incident to the said petition." There is nothing in the statute to warrant such an order. The expense of the inquiry before the accountant or other competent person is no doubt imposed upon the company in any event; but the only provision relating to costs inter partes is that contained in s. 36, which provides that if in the case of any petition so presented it appear to the Court that there was no sufficient ground for presenting the same, the Court may, if it think fit, order the petitioner to pay the whole or any part of the costs of and incident to such petition. Costs being entirely the creation of statute, it is impossible to hold that they are given by implication. But even if they were, we should not gather from such a special provision as that in s. 36 that they were intended to be given in any other case, but rather to the contrary. We are of opinion that the order as to the 2433*l.* 6*s.* 6*d.* is entirely without jurisdiction. For these reasons we are of opinion that the order must be quashed, except as regards the 650*l.*, and that the rule must be made absolute to that effect.

Rule absolute.

Solicitors for prosecutors: *Venning, Sons, & Mannings.*

Solicitor for defendant: *H. R. Tyrrell, for Llewellyn & Ackrill, Tunstall, and Arthur Challinor, Hanley.*

W. J. B.

THE QUEEN *v.* CATLEY.
CATLEY *v.* BILL.

1887
June 10.

Friendly Society—Branch—Expulsion of Member—Appeal from Branch to Society—Failure to decide thereon within forty Days—Application to County Court—Jurisdiction—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.

By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 22, disputes between members of a registered friendly society and the society are to be decided in manner directed by the rules of the society. By sub-s. (*d*) where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply to the county court, which may hear and determine the matter in dispute.

A member of a branch of a friendly society having been excluded therefrom by the branch committee appealed, under the rules of the branch, to the general committee of the society, who failed to decide the dispute within forty days after application :—

Held, that the appeal was a "reference" within the meaning of the sub-section, and that a county court had jurisdiction to hear and determine the matter in dispute.

RULE calling on the judge of the County Court at Peterborough and Enoch Catley to shew cause why a prohibition should not issue to prohibit them from further proceeding with an action in the county court between Catley as plaintiff and T. H. Bill as defendant, on the ground that the Court had no jurisdiction.

There was also an appeal by the defendant against the judgment of the county court on the ground that it was wrongly entered in point of form, but the argument and decision on such appeal do not require to be reported.

The plaintiff was a member of the Peterborough branch of the Locomotive Steam Enginemen and Firemen's Friendly Society. He had been injured by a railway accident, and was therefore in receipt of a pension from the funds of the society. For some years he had also received certain sick allowances made by the branch to Goodall, another member of it, and had transmitted the amounts to him. On an allegation by the defendant, who was secretary of the branch, that Goodall had resumed work and therefore was disentitled to receive the allowance, the committee

1887

THE QUEEN v. CATLEY.

of the branch held a meeting to consider the conduct of Goodall and the plaintiff, and, after hearing the plaintiff and adjourning the matter, excluded him under Rule 32, which empowered the branch committee to exclude a member for fraud, and provided that thenceforth he should forfeit all claims upon the branch, but that any such member might appeal from such decision to the general committee.

On March 18 the plaintiff's solicitor gave to the general committee of the society notice of an appeal against the decision of the branch committee. The notice was received on March 19 or 20. An application was made to the general committee that, as the plaintiff's hearing and memory had been impaired by the accident, he might be represented by his solicitor before the general committee; but the application was refused. The plaintiff did not appear before the general committee, and on May 11 the general committee affirmed the decision of the branch. On June 9 the plaintiff's solicitors wrote for information as to the decision. On September 30 the plaintiff took proceedings in the county court to recover twenty-six weeks pension.

At the hearing the county court judge at first decided in favour of the defendant on the ground of want of jurisdiction, but afterwards granted a new trial on the ground that no decision having been made by the general committee on the dispute within forty days after application to the society for a reference, the county court had jurisdiction. The action was accordingly re-tried, and judgment was given for the plaintiff and exonerating him from any fraud. (1)

(1) By 38 & 39 Vict. c. 60, s. 22: "Every dispute between a member or person claiming through a member or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court. Provided as follows:—"

(*a.*) The parties to a dispute in a society may by consent . . . refer such dispute to the chief registrar . . .

(*b.*) He may administer oaths, &c., &c.

(*c.*) Where the rules of a society direct that disputes shall be referred to justices, the dispute shall be determined by a court of summary jurisdiction, or, by consent, by the county court.

"(*d.*) Where the rules contain no

1887

THE QUEEN v. CATLEY.

Morten, shewed cause. First. The county court judge had jurisdiction to grant the new trial on a question of law as well as on a question of fact. The question whether forty days had elapsed was one of fact.

Secondly. He had jurisdiction to hear and determine the case. The rules of the branch society provide, by rule 23, for sick allowances; by rule 32, that if a member fraudulently obtains any allowance, the branch committee may fine and exclude him,

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direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute."

By the rules of the Peterborough Branch of the society, rule 32: "If any member shall by any artful, false, or fraudulent representation, or demand, obtain, or attempt to obtain, any allowance, benefit, or money from the funds of this branch, or shall knowingly receive or continue to receive any such allowance, benefit, or money after his claim or just right thereto shall have ceased, or if any member defraud or attempt to defraud this branch in any manner whatsoever, he shall be immediately suspended from all benefits, and upon due proof thereof to the branch committee, who shall, before giving their decision, allow such member, if his address be known, an opportunity of explaining his conduct to the branch committee, the branch committee may inflict a fine not exceeding one pound, or they may exclude such member, and thenceforth he shall forfeit all claims upon the branch; but any such member may appeal from such decision to the general committee."

By rule 59: "If any dispute shall arise between any member, or person claiming under or on account of any member, or under the rules of the society, and the trustees, treasurer, or other officers of this branch, or the committee thereof, it shall be determined by the general committee; but any person, committee, or branch feeling aggrieved by any such determination, may, on giving to the general secretary at least twenty-eight days' notice of his intention so to do, appeal to a court of appeal, which shall consist of two members of the general committee to be chosen from time to time by a majority of the members of the general committee for the purpose, and five representatives of the branches of the society (three of whom may be general auditors), to be elected by the branches in their alphabetical order. The decision of a majority of those constituting the court of appeal, meeting to decide the dispute or disputes, shall be binding and conclusive on the others, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

1887

THE QUEEN v. CATLEY.

"and thenceforth he shall forfeit all claims upon the branch; but any such member may appeal from such decision to the general committee;" and by rule 59, that if any dispute shall arise between any member and the committee of the branch, it shall be determined by the general committee, with an appeal therefrom to a court of appeal formed of two members of the general committee.

The appeal was made from the decision of the branch to the general committee. It was a "dispute" within the meaning of 38 & 39 Vict. c. 60, s. 22, and no decision having been made within forty days, the county court had jurisdiction. The word "reference" in sub-s. (*d*) is not limited to an arbitration before some third party.

Douglas Walker, in support of the rule. First. The county court judge gave judgment for the defendant on a point of law, and therefore could not grant a new trial.

Secondly. The earlier Friendly Societies Acts shew that the word "reference" in the Act of 1875, s. 22, means reference to an arbitrator or to justices.

By 10 Geo. 4, c. 56, s. 27, provision shall be made by the rules of such society specifying "whether a reference of every matter in dispute . . . ." shall be made to justices or to arbitration. 4 & 5 Wm. 4, c. 40, s. 7, refers to that enactment, and after reciting that it is expedient that further provision should be made in case the reference is to arbitrators, enacts that when an application has been made to the society for the purpose of having any dispute so settled by arbitration, and such application has not within forty days been complied with, or the arbitrators have neglected or refused to make any award, two justices may hear and determine the matter in dispute. The forty days' limit is there first introduced. It applies solely to a failure of arbitrators—that is to say, persons independent of the parties—to settle the dispute. By 18 & 19 Vict. c. 63, the two earlier Acts are repealed, and by s. 25 rules must be made setting forth "(6) the manner in which disputes . . . . shall be settled," and by s. 40 "every dispute . . . . shall be settled in manner directed by the rules of the society without appeal, provided that where the rules of any society established under any of the Acts thereby

repealed shall have directed disputes to be referred to justices such disputes shall . . . . be referred to and decided by the county court." There there is no provision as to forty days. But in s. 41, dealing with settlements of disputes by arbitrators, provision is made that if no decision is made by them within forty days, an application may be made to the county court.

Those two sections have been combined in 38 & 39 Vict. c. 60, s. 22, by which every dispute "shall be decided in manner directed by the rules of the society," and "(*d.*) Where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules," the party may apply to the county court. The proceeding to review the resolution of the branch society was not "a reference under its rules," nor is it called so therein, but was an appeal to the general committee. A reference under the rules is a reference to external arbitrators, as the history of the legislation shews.

WILLS, J. I am asked by my brother Day to express our joint opinion. The case is complicated and difficult, for the enactments in question are not so easy to understand as might be wished in matters of such general and great importance.

The first question is, What was the subject-matter with which the county court judge had to deal? I assume for the moment that he would have jurisdiction under 38 & 39 Vict. c. 60, s. 22, sub-s. (*d*). That sub-section, so far as this point of the case is concerned, is perfectly free from difficulty: "Where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court or to a court of summary jurisdiction, which may hear and determine the matter in dispute." What was that here? The only "matter in dispute" was that the branch committee had excluded this member, and, as he alleged, wrongfully excluded him. Under rule 32 of the rules of the branch, when they had expelled him by their order, an appeal lay to the general committee.

But from rule 59, which provides for that appeal, it is plain

1887

THE QUEEN v. CATLEY.

Wills, J.

that although it is called an appeal it is really a matter in dispute which has arisen between a member and the branch, because the only words giving the general committee power to act in the matter do not speak of any "appeal" or "right of appeal," but in terms relate to cases where a dispute has arisen between a member and the committee of the branch, and it is that state of things only which gives the general committee jurisdiction. Therefore by those two rules the appeal from the branch committee is treated as a dispute arising between the member and the branch committee; and it should be remembered that these are rules made with reference to this specific enactment, and I cannot doubt that it was intended that when such a state of things arose the matter was to be treated as one of those referred to in the Act. It was the subject-matter of that dispute, and that only, that the county court judge had power to deal with in the proceeding under s. 22 (*d*); for it is not a general application to the county court to enforce legal rights, but an application to the county court judge substituted for the tribunal created by the rules, and who is to act in their place. The parties to the dispute were the branch committee on the one side—the member on the other.

The next question is whether the state of things had arisen here which entitled the county court judge to act at all? There is no guide to the answer except the words of the Act, which is a consolidating and amending Act, as the preamble shews; and when we have to deal with a set of provisions which do not exactly correspond with what has been previously enacted it is impossible to judge whether the intention of the legislature in slightly altering the phraseology was to consolidate or to amend. Therefore we must read the section de novo to ascertain what it means. After saying that every dispute between a member and the society shall be decided in the manner directed by the rules of the society, sub-s. (*d*) provides that "where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply . . . . to the county court . . . . which may hear and determine the matter in dispute." Counsel for the society argued that this is a mere consolidation of certain previous Acts of

Parliament shewing clearly that the reference under rules in respect of which such a process as this was given applied only to a reference to external arbitration, and not to the domestic forum apart from any outside arbitrator. It is impossible to ascertain from merely looking at the Act whether it was to consolidate or amend, and, having regard to the words of s. 22, I cannot conceive why a reference of a dispute is less a reference of a dispute because it happens to be to a committee appointed for that purpose. It is a reference under the rules, and the only reference under the rules; and if there was any reason making it desirable that the limitation of forty days should be imposed on the action of arbitrators over whom the society has no control, à fortiori there is reason why the limitation should be imposed on the society itself or on a committee constituting the tribunal, when it is entirely within their own control how long they will take in settling a dispute of this kind. And also, if I am to be guided at all by the previous Acts, whether by this Act consolidated or amended, I think they are in favour of my view, for in every one of those sections of the Act on which the learned counsel for the society relied the word "arbitrator" is used, and it is used in expressions in reference to arbitrators, and that expression is dropped here. It seems to me, therefore, that it is clear the committee in this instance did not deliver their decision for more than forty days after the question had arisen. The learned counsel said there was a difficulty imposed by reason of the twenty-eight days' notice under rule 59. But that twenty-eight days' notice does not apply to this appeal at all, but to some further appeal. But whether it does or not, that is a difficulty created by the committee themselves, by which the society must stand; they have made the rule reducing the forty days to twelve, and they must abide by it. It does not affect the provision, carefully and wisely laid down by the Act, that these disputes shall be promptly settled, and, if they are not, the person aggrieved may go to another tribunal. I think the very state of circumstances has arisen which gives jurisdiction to the county court judge.

If that be so, there is no other question, for there is a decision of a county court judge on a matter of law, and the only appeal from a county court judge to us is on matter of law. The result

1887

THE QUEEN v. CATLEY.

Wills, J.

is that his decision that the appellant was unreasonably expelled stands, and that is a "matter in dispute." I do not go beyond that, and I think his decision ought to have stopped there, for it is not an action by the appellant to recover his pension. The county court judge seems to have treated the proceeding as if it was an action for recovery of arrears of pension. I think that was a mistake; and that there is no jurisdiction under the Friendly Societies Act in *this* proceeding to award that remedy. There may be power to do so *afterwards*, for under s. 22 an application to enforce the decision of the committee may be made to the county court. But it is unnecessary to say more on this point, for I am quite sure that the society will act on the judgment of this Court. The judgment of the county court judge must be varied to the extent which I have indicated.

DAY, J., concurred.

Rule discharged.

Solicitors for plaintiff: *Clarke, Rawlins, & Co.*
Solicitors for defendants: *S. R. Groom & Co.*

J. R.

June 23.

BRIDPORT ELECTION PETITION.

HOUNSELL AND OTHERS *v.* SUTTILL AND OTHERS.

Municipal Corporation—Election of Alderman—"Mayor elect" voting for Aldermen—Void Election—45 & 46 Vict. c. 50, s. 60.

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 60 (2), the election of aldermen shall be held immediately after the election of the mayor; "(3) an outgoing alderman, although mayor elect, shall not vote." On the day appointed for the election of mayor and aldermen an alderman was elected mayor, and thereupon made and subscribed a declaration in the form contained in the 8th schedule of the Act. He then voted in the election of aldermen:—

Held, that his vote was invalid, for at the time when he voted he had not ceased to be an "outgoing alderman" within s. 60 (sub-s. 3) of the Act.

SPECIAL CASE under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 93, sub-s. 7.

On November 9, 1886, the quarterly meeting of the council

of the borough of Bridport was held for the ordinary election of mayor and aldermen for the borough.

The election of mayor was the first business transacted at the meeting. Charles Edmunds was elected mayor, and thereupon made and subscribed a declaration as in the 8th schedule to the Municipal Corporations Act, 1882.

Immediately after the election and the making and subscribing the declaration the council proceeded to the election of aldermen.

The outgoing aldermen at such last-mentioned election, subject to the question as to whether Charles Edmunds, by his election to the office of mayor, and by his making and subscribing the said declaration, had ceased to be an outgoing alderman within the meaning of s. 60, sub-s. 3, of the Act, were John Pickard Suttill, James Beach, and Charles Edmunds.

Charles Edmunds presided as chairman at the said election of aldermen.

The respondents Suttill, Beach, and Knight, and Messrs. Nanks, Whetham, and Biddlecombe, were duly proposed as candidates.

The election was held by the aldermen and councillors entitled to vote delivering voting papers to the chairman, and by the chairman placing amongst the voting papers a voting paper containing his own vote.

The chairman produced and read the voting papers, when it was found that eleven votes purported to have been given for each of the respondents Suttill, Beach, and Knight, and ten votes each for Nanks, Whetham, and Biddlecombe. Thereupon without giving any further or casting vote the chairman declared the respondents Suttill, Beach, and Knight, duly elected.

One of the voting papers counted by the chairman as being a good vote for each of the respondents Suttill, Beach, and Knight, was the voting paper signed by the chairman as previously mentioned.

If the chairman's vote was not the vote of a person entitled to vote at the election, then the lawful votes would have been ten each for the respondents, and ten each for Nanks, Whetham, and

1887

BRIDPORT ELECTION PETITION. HOUNSELL v. SUTTILL.

Biddlecombe, in which case the chairman would have had the casting vote under s. 60, sub-s. 6, of the Act.

The question for the opinion of the Court was whether in the circumstances the respondents were duly elected by a majority of lawful votes.

A. Charles, Q.C. (*Mattinson* with him), for the petitioners. The respondents were not duly elected. By 45 & 46 Vict. c. 50, s. 60 (2), the election of aldermen shall be held immediately after the election of the mayor; (3) "an outgoing alderman, although mayor elect, shall not vote."

By sub-s. (6): "In case of equality of votes, the chairman, although not entitled to vote in the first instance, shall have the casting vote." By sched. 2, r. 9, at every meeting of the council, the mayor, if present, shall be chairman, and by r. 11, in case of equality of votes, the chairman of the meeting shall have a second or casting vote.

Edmunds had no right to vote. He did not give a casting vote. The former Act, 7 Wm. 4 & 1 Vict. c. 78, s. 14, enacted that in case of equality of votes among those entitled to vote, the mayor or chairman should have a casting vote, whether or not he might be entitled to vote in the first instance. On that statute it was decided that where an alderman who had just been elected mayor was still an outgoing alderman, and could not vote originally for an alderman, "as he could not vote originally for him, the case never arose in which he could give a casting vote for him as mayor": *Reg.* v. *Stanley.* (1) The words "although mayor elect" have only been introduced into the present Act to describe the disqualification in clearer terms. An invalid vote must be struck off. Then there is equality, and nothing in the case shews that a casting vote would have been given.

Sir C. Russell, Q.C. (*Lewis Coward*, with him), for the respondents. The words "mayor elect" are used in contradistinction to mayor qualified. There is a difference between the earlier and the present Municipal Corporations Acts. 5 & 6 Wm. 4, c. 76, s. 25, provided that aldermen going out of office should not be

(1) 11 Ad. & E. 869, 886.

entitled to vote in the election of a new alderman. It was thought that a retiring officer should not have a voice in the election. Then s. 14 of 7 Wm. 4 & 1 Vict. c. 78, gave a casting vote to the mayor. Sect. 60 (3) of 45 & 46 Vict. c. 50, provides that an outgoing alderman, although mayor elect, shall not vote. But the case states that "Charles Edmunds was elected mayor, and thereupon made and subscribed a declaration" under the Act. "Mayor elect" is one chosen, but not qualified until he has done more, viz., made and subscribed the required declaration: s. 15 (3). That was done by Edmunds, and he became mayor. No doubt in *Reg.* v. *Stanley* (1) the mayor was elected and qualified, but the statute was then confined to outgoing aldermen. A casting vote was given, although perhaps prematurely, for the numbers were equal.

A. Charles, Q.C., replied. Edmunds was an outgoing alderman, and not the less so by being mayor.

MATHEW, J. I am of opinion that the election was invalid. I come to that conclusion on the plain language of the Act, 45 & 46 Vict. c. 50, s. 60, which provides by sub-s. (2) that the election of aldermen shall be held "immediately after the election of the mayor"; and by sub-s. (3) that "an outgoing alderman, although mayor elect, shall not vote." Who is the "mayor elect"? Clearly the person referred to in the preceding clause, the person who had immediately before been elected mayor. It has been said that on the particular facts of this case, what he did was merely in anticipation of what he would have done afterwards, and, if so, that it is not worth while to complain of what was done, as he might have given a casting vote. But we cannot introduce the doctrine of equivalents into the construction of Acts of Parliament. For instance, by sub-s. 4: "Every person entitled to vote . . . . may vote . . . . by signing and personally delivering a voting paper." That provision must be strictly followed, and although it might be fairly sufficient for all purposes to have a paper not signed but approved of, or even an announcement of the name of the person for whom the elector voted, it would not be in compliance with the Act, and the

(1) 11 Ad. & E. 869, 886.

1887

BRIDPORT ELECTION PETITION. HOUNSELL v. SUTTILL.

election must be set aside. The Act has not been complied with, and the election is void.

CAVE, J. I am of the same opinion. Mr. Edmunds unfortunately took on himself to do what the Act in plain language said he should not do, viz., vote.

Judgment for petitioners.

Solicitors for petitioners: *Nicholson & Graham.*
Solicitors for respondents: *Meredith & Co.*

J. R.

June 24.

THE VESTRY OF ST. GILES, CAMBERWELL, AND THE BOARD OF WORKS FOR THE GREENWICH DISTRICT.

Metropolis Management Acts—New Street in Two Districts—Order for exclusive Management by One District—Paving Expenses, Recovery of—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 140—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 86.

An order of the Metropolitan Board of Works made under s. 140 of the Metropolis Management Act, 1855, and s. 86 of the Metropolis Management Amendment Act, 1862, that a new street in more than one parish or district shall be under the exclusive management of one vestry or district board for the purposes of paving, and the expenses payable by each be divided equally between the two parishes or districts, does not entitle the managing vestry or board to require the other vestry or board to pay one-half of the expenses properly chargeable on frontagers under s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Amendment Act, 1862.

SPECIAL CASE stated in an action by the plaintiffs for 613*l.* 13*s.* 1*d.*

The plaintiff vestry and the defendant board were respectively entitled to the powers given by the Metropolis Management Act, 1855, and by the several Metropolitan Management Amendment Acts of 1856, 1858, and 1862 respectively, and were subject to the several provisions of those Acts.

Canterbury Road was a street within the definition of the word "street" contained in the Metropolis Management Act, 1855, s. 250, and the Metropolitan Management Act, 1862, s. 112, and was also a "new street" within the definition of the words "new street" contained in the last-mentioned section. Sewers had been constructed therein, and it was lighted by public lamps, and it had never heretofore been paved under s. 105 of the Metropolis Management Act, 1855.

1887

VESTRY OF ST. GILES, CAMBERWELL v. BOARD OF WORKS FOR GREENWICH DISTRICT.

Canterbury Road and the roadway and footpaths thereof were situate in more than one parish or district, that is to say, it was partly within the plaintiff's parish and partly within the defendant's district.

By arrangement between them a resolution was passed by the plaintiff vestry and also by the defendant board in the month of May, 1883, to pave the said new street, which was described as extending from the Manor Grove to the Grand Surrey Canal, and the plaintiffs and defendants each made an estimate of the cost of paving both sides of the said new street, and made an apportionment of such estimated cost upon the houses and land abutting upon the said new street in the parishes of Camberwell and Deptford. The apportionments were identical, the apportionment made by the plaintiffs relating both to the houses and land in the said new street in their own parish, and the houses and land in such new street in the district of the defendants, and the apportionment made by the defendants relating both to the houses and land in such new street in the district of the defendants and to the houses and land in such new street in the parish of the plaintiffs, so that all the houses and land on both sides of the new street were included in each of such apportionments, and it was arranged that the plaintiff vestry should endeavour to obtain payment from such only of the said owners to which such apportionment made by the plaintiffs related as owned houses and land abutting on the side of such new street which was in Camberwell, and that the defendant board should endeavour to obtain payment from such only of the said owners to which such apportionment made by the defendants related as owned houses and land abutting on the side of such new street which was in the district of the defendants. An owner of a number of houses on the side of the said new street in the defendant's district refused to pay the proportion of the estimated expenses of paving such new street in respect of such houses, and a summons was issued against him on the application of the defendants, but the magistrate who heard the summons decided that the apportionment so made as aforesaid was bad, and refused to enforce it, but offered to grant a special case for the opinion of the Court of Queen's Bench Division thereon.

1887

VESTRY OF ST. GILES, CAMBERWELL v. BOARD OF WORKS FOR GREENWICH DISTRICT.

On or about October 11, 1884, the plaintiffs, by letter, made an application to the Metropolitan Board of Works asking that authority to make, under the 140th section of the Metropolis Management Act, 1855, and the 86th section of the Metropolis Amendment Act, 1862, an order giving to the plaintiffs the exclusive management of Canterbury Road, and setting out facts which had occurred as to the said road before the date of that letter.

On July 31, 1885, the Metropolitan Board of Works made an order by which, after reciting, inter alia, that it had been represented to the Metropolitan Board that it would be convenient and proper that a certain part of the street should for the purpose of paving, &c. be placed under the exclusive management of the plaintiffs, the expenses thereof being borne in equal moieties by the defendants and the plaintiffs, it was ordered: That a portion of the said street called Canterbury Road thereinbefore specified as being within the said parishes of Saint Giles, Camberwell, and Saint Paul, Deptford, in the said Greenwich district, as shewn by a blue colour on the plan annexed thereto, should thenceforth for the purpose of sewerage, drainage, paving, making up, lighting, watering, cleansing, repair and maintenance, be under the exclusive management of the vestry of St. Giles, Camberwell, and that the costs of constructing and maintaining any new sewer or drain in such portion of Canterbury Road, or of the reconstruction, reparation, or maintenance of any existing drain therein, or of the paving, making up, lighting, watering, cleaning, repair and maintenance of the said portion of the street, roadway, and footpaths should be borne by the vestry of St. Giles, Camberwell, and the board of works for the Greenwich district respectively, the board of works for the Greenwich district paying to the vestry of St. Giles, Camberwell one-half of the costs and expenses of and incidental to such sewerage, drainage, paving, making up, lighting, watering, cleansing, repair and maintenance as aforesaid.

On or about January 20, 1886, the plaintiffs required for defraying the expenses of the execution by such vestry for paving and making up the said portion of the Canterbury Road within the district of the defendants' board the sum of 613*l.* 13*s.* 9*d.*, and

made an order for the payment of the said sum. By the order [set out], which was addressed to the board of works for the district of Greenwich, in the county of Kent (after reciting, inter alia, the order of the Metropolitan Board of Works), the vestry of Saint Giles, Camberwell required the said board of works for the Greenwich district to pay to them, the said vestry, on or before February 7, 1886, the sum of 613*l.* 13*s.* 9*d.* being one-half of the expenses of paving and making up the said Canterbury Road, and all costs and expenses of and incidental thereto.

The said sum of 613*l.* 13*s.* 9*d.* claimed by the plaintiff vestry was arrived at by taking half of the contract sum for the proposed paving and making up the said new street.

The defendant board had refused to pay the said sum or any part thereof, and disputed their liability to pay the same or any part thereof.

The questions for the opinion of the Court were:—

1. Whether the order of July 31, 1885, of the Metropolitan Board was valid.

2. Whether the sum of 613*l.* 13*s.* 9*d.* was then payable under the facts of the above case by the defendant board to the plaintiff vestry.

If the Court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiffs for 613*l.* 13*s.* 9*d.* and costs of suit.

If in the negative, then judgment was to be entered up for the defendant, with costs of suit.

A. Charles, Q.C. (*Prosser*, with him), for the defendants. The cost of paving a new street must in the first instance be borne by the frontagers: 18 & 19 Vict. c. 120, s. 105; and the Metropolitan Board of Works have no power under subsequent Acts to make an order imposing the burthen on the vestry. The order of the Metropolitan Board does not authorize the plaintiffs to call on the defendants for half the expenses of paving a new street. If s. 140 only were regarded it might be thought to include the paving of a "new street," but as specific provision is made in s. 105 for paving a new street, s. 140 will not serve the plaintiffs. The defendants do not object to the equal division of expenses.

1887

VESTRY OF ST. GILES, CAMBERWELL v. BOARD OF WORKS FOR GREENWICH DISTRICT.

F. M. White, Q.C. (with him, *Austin*), for the plaintiffs. The order of the Metropolitan Board deals not only with paving but with other matters. Sect. 140 clearly applies to new streets. "The word 'streets' must primâ facie include both old and new streets": per Lord Esher, M.R., in *Hampstead Vestry* v. *Cotton*. (1) The Acts of 1862 and 1855 are to be read together. The order only means that the street is put under the management of the vestry in the way the statute points out. So the order is good. Sect. 140 substitutes one vestry for the other, and whatever the powers of each are they must be exercised by the vestry in charge.

Secondly, it is said that the order is premature. But it is optional with the parish to do the work, and then to call on the frontagers to pay, or to call on the frontagers to do it. The order of the board of works is general and until revoked by them it places the whole street under the jurisdiction of one vestry.

In *Vestry of Mile End* v. *Whitechapel Union* (2) it was held that an order could only be made on the frontagers of both sides of such a street. To get over that difficulty the road authorities made two simultaneous orders on each half.

[THE COURT. The plaintiffs are demanding from the defendants that which they cannot recover from the frontagers, for the order of the Metropolitan Board has taken away the jurisdiction of the defendants.]

The plaintiffs are, under s. 140 and the order of the Metropolitan Board, in the position of the vestry having the management of the street, and have all their powers and duties. Assume that the plaintiffs have a duty to proceed under s. 105, they may do the work and get the money. It would be unfair that the vestry which is charged with all the trouble of management, should have to advance money to pay the contractor for the paving, after having made a contract advantageous for both vestries.

Lastly, s. 105, referring to a street "not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate," only applies to streets within the ambit of a parish or district. This street is not so, for it is longi-

(1) 16 Q. B. D. 475, at p. 484. (2) 1 Q. B. D. 680.

tudinally divided between two. But if s. 140 includes s. 105, and the Court should think it gives power to make orders on owners out of their own district, then the cost should be borne by moieties. By 25 & 26 Vict. c. 102 (the Metropolis Local Management Act, 1862), s. 77, where any vestry or district board shall have paved or be about to pave any new street the owners shall contribute, and any costs "shall be recoverable either before the work shall be commenced, or during its progress, or after its completion;" and it shall be lawful for the vestry or district board to accept payment by instalments spread over a period not exceeding twenty years. That shews that it would be unfair to prevent the managing vestry recovering on account from the contributory vestry money expended for both. A large sum might be due from frontagers, payable only by instalments spread over many years.

The order of the Metropolitan Board of Works is valid. It follows the statutes and the vestry must act on it as the Act directs.

Sect. 105 is not incorporated with the other section, so neither parish can use it, and the cost must fall into the general repairs.

But if it is incorporated, the defendants have the same right of recovering payment from the owners and should obtain their moiety.

MATHEW, J. The intention of the order, rightly interpreted, was to deal with the expenses payable by each of the two bodies, and to direct that those expenses payable by each should be divided equally. To that the defendants have no objection. As to the second question, it is manifest, as soon as the facts are explained, that the plaintiffs are endeavouring to recover a share of expenses for which the defendant body is not chargeable; the plaintiffs are thus attempting to go beyond the order. The difficulty is said to arise from s. 105 and s. 140. Sect. 105 provides for casting on the frontagers the expenses of paving a "new street." Sect. 140 provides that "It shall be lawful for the Metropolitan Board of Works, where it appears to them that any street or line of street, being in more than one parish or district, should be placed under the exclusive management

1887

VESTRY OF ST. GILES, CAMBERWELL v. BOARD OF WORKS FOR GREENWICH DISTRICT.

of one vestry or district board for the purposes of paving, lighting, watering, and cleansing, or any of them, or for the purposes of sewerage or drainage, or for all the purposes of this Act, to order that the same shall be under the management of such vestry or board accordingly." . . . . There is no inconsistency between the two sections, if that is interpreted to apply to a "new street." Treating it as applicable to a "new street," the effect of the section is to substitute the plaintiffs for the defendants, and to give the plaintiffs the rights which the defendants would have against frontagers, that is to recover the expenses from the frontagers, and not to put the expense on the body not responsible in the first instance, and which would have no power of obtaining an indemnity hereafter. For if an attempt was made by them to recover from the frontagers they would be told that any jurisdiction which they had was transferred. The second question must be answered in favour of the defendants.

CAVE, J. The two sections, viz. s. 140 of the Act of 1855 and s. 86 of the Act of 1862 justify the order of the Metropolitan Board, and the effect of that order is to put the whole of the street, although only a moiety is within the jurisdiction of the plaintiffs, entirely within their jurisdiction. I see no inconvenience, but much convenience, in their being able to exercise the powers of s. 105 of the former Act and s. 77 of the later Act. Sect. 77 provides that the expenses of paving may be got before, or during the progress, or after completion of the work, and the grievance of the plaintiffs apparently is that they cannot get the money in the third way, viz. after completion, and cannot exercise the power of compelling payment by the frontagers, without having in the first place to advance the money, just as every authority which has to pave a street must do, if it intends to give the owners time to pay by instalments.

Counsel for the plaintiffs says that it is only fair and right to charge the defendants in the first instance, and to get repayment from the owners. The answer is that there is no section in the Act to enable that to be done. The Metropolitan Board have power to put these streets under the sole jurisdiction of the plaintiffs, and to apportion the way in which the expenses are to be

borne; but that must mean the way in which the expenses are to be borne that are to come out of the rates of the two districts. There is nothing in the Act to enable the plaintiffs to get money from the defendants which is not ultimately to be paid by them, because it is convenient to the plaintiffs to give the owners time for payment. If, because the plaintiffs may have to advance the money themselves in the first instance, they do not find it convenient to give the owners time, they may enforce payment before the work commences. Certainly, under these circumstances, we ought not to imply a power to charge the defendants with a portion of these expenses, when it is admitted that they are expenses which the defendants may ultimately not be called on to bear.

Judgment for defendants.

Solicitors for plaintiffs: *Marsden & Son.*
Solicitors for defendants: *Watson, Sons, & Room.*

J. R.

JOHNSTONE *v.* MARKS. (1)

July 27.

Infant—Necessaries—Evidence.

Where an infant is sued for the price of goods sold to him on credit, he may, for the purpose of shewing that they were not necessaries, give evidence to shew that at the time of the sale he was sufficiently provided with goods of the kind supplied.

Ryder v. *Wombwell* (Law Rep. 3 Ex. 90) dissented from. *Barnes* v. *Toye* (13 Q. B. D. 410) approved.

APPEAL from the County Court of Westminster.

The action was by the plaintiff, a tailor, against the defendant for the price of clothes supplied. The defence was infancy, to which the plaintiff replied that the goods supplied were necessaries. It was proved at the trial that the goods in question were supplied by the plaintiff to the defendant, and that when they were supplied the defendant was under age. On the issue raised by the reply the solicitor for the defendant proposed to prove by the evidence of the defendant's father that the defendant was sufficiently supplied with clothes at the time of his purchases from the plaintiff. Upon objection by the plaintiff, the judge,

(1) Before Lord Esher, M.R., Lindley and Lopes, L.JJ., sitting as a Divisional Court of the Queen's Bench Division.

1887

JOHNSTONE v. MARKS.

on the authority of *Ryder* v. *Wombwell* (1), held the evidence to be inadmissible.

The judge found that some of the clothes supplied were and that others were not necessaries, and gave a verdict for the plaintiff for the price of those which he held to be necessaries.

Heather, for the defendant. The defendant is entitled to a new trial. Both on principle and authority the evidence rejected was admissible. Where to a defence of infancy it is replied that the goods sold were necessaries, the issue raised is, not whether, apart from the facts of the particular case, the goods supplied belong to the class of necessaries, but whether, having regard to the facts of the particular case, at the time when they were supplied the goods really were necessary to the infant. Evidence that the infant was already sufficiently provided is clearly relevant to this issue. The Court of Queen's Bench in *Foster* v. *Redgrave* (2) held the evidence admissible. The decision was not before the Court of Exchequer when *Ryder* v. *Wombwell* (1) was decided. The judgment of the Court of Exchequer Chamber in *Ryder* v. *Wombwell* (3), which was delivered by Willes, J., merely notices the conflict of authority, as the point was not before the Court. But the earlier cases are in favour of the ruling of the Court of Queen's Bench in *Foster* v. *Redgrave* (2). *Bainbridge* v. *Pickering* (4); *Brayshaw* v. *Eaton*. (5) In the recent case of *Barnes* v. *Toye* (6) a Divisional Court preferred the authority of *Foster* v. *Redgrave* (2) to that of *Ryder* v. *Wombwell*. (1)

Rawlinson, for the plaintiff. The evidence was inadmissible. It was not suggested that the plaintiff knew or had the means of knowing that, when the defendant entered into the contract, he was already sufficiently provided with necessaries of the kind supplied. The fact if proved would have been as irrelevant to the issue as that of the defendant having an allowance sufficient to enable him to pay ready money for such necessaries. *Burghart* v. *Hall* (7). *Ryder* v. *Wombwell* (1) is a decision of equal authority with *Foster* v. *Redgrave* (2) and *Barnes* v. *Toye*. (6)

(1) Law Rep. 3 Ex. 90.
(2) Law Rep. 4 Ex. 35 (note to *Ryder* v. *Wombwell* in Exch. Ch.).
(3) Law Rep. 4 Ex. 32.
(4) 2 Wm. Bl. 1325.
(5) 5 Bing. N. C. 231; 7 Scott, 183.
(6) 13 Q. B. D. 410.
(7) 4 M. & W. 727.

1887

JOHNSTONE v. MARKS.

LORD ESHER, M.R. I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it. In *Ryder* v. *Wombwell* (1) the Court of Exchequer Chamber had cases before them which were inconsistent with the view taken in the court below, but, holding as they did that the goods supplied could not possibly be necessaries, there was no occasion for them to decide whether this evidence was relevant. A Divisional Court has since in *Barnes* v. *Toye* (2) decided that the evidence is relevant and I entirely agree with the decision.

LINDLEY, L.J. I am of the same opinion. The decision of the Court of Exchequer in *Ryder* v. *Wombwell* (3) is contrary to the current of authority. If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him. The law is in my opinion correctly stated in *Barnes* v. *Toye*. (2)

LOPES, L.J. As one of the judges who decided *Barnes* v. *Toye* (2) I am, of course, of the same opinion.

THE COURT added that should the question be raised before them sitting as a division of the Court of Appeal they would be prepared to give the same decision.

Appeal allowed. (4)

Solicitors for plaintiff: *Watkins, Baker, Baylis, & Baker.*
Solicitors for defendant: *Steadman & Van Praagh.*

(1) Law Rep. 4 Ex. 32.
(2) 13 Q. B. D. 410.
(3) Law Rep. 3 Ex. 90.
(4) The parties having agreed to refer the case for decision to Lopes, L.J., a new trial was not granted.

H. D. W.

1887
Aug. 3, 11.

[IN THE COURT OF APPEAL.]

COUNSELL *v.* THE LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY, LIMITED.

Bill of Sale—Validity—Registration—Promissory Note forming part of the Contract—Defeasance—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10.

By a bill of sale, drawn in accordance with the form in the schedule of the Bills of Sale Act, 1882, and duly registered, the grantor assigned certain specified chattels to secure to the grantees the repayment of a sum of 80*l.*, and interest thereon at 30 per cent.; the principal sum to be paid, together with the interest then due, by equal monthly payments of 5*l.* 6*s.* on specified days until the whole sum and interest should be fully paid. The grantor at the same time gave a separate promissory note bearing the same date as the bill of sale, promising to pay the grantees, or order, 95*l.* 12*s.*, by equal monthly instalments of 5*l.* 6*s.*, payable on the same days as the monthly payments in the bill of sale, until the whole sum of 95*l.* 12*s.* should be fully paid; and the note contained a stipulation that in case of default in payment of any instalment the whole of the same sum should become due and payable:—

Held (affirming the decision of the Queen's Bench Division), that by reason of this stipulation the promissory note was a defeasance of the bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, because if at any time the whole sum payable on the note were paid, the rights of the grantees under the bill of sale would cease, and therefore the bill of sale was void.

Appeal from a decision of the Queen's Bench Division (Mathew and Grantham, JJ.).

Action for damages for a trespass by the defendants in breaking and entering the plaintiff's house, and for wrongfully seizing and taking possession of certain goods therein.

The defence alleged that the defendants lawfully entered the plaintiff's house and seized the goods under a bill of sale made by the plaintiff in favour of the defendants.

At the trial before Denman, J., and a jury the following material facts were proved or admitted:—

By a bill of sale, dated September 30, 1885, the plaintiff assigned to the defendants certain chattels and things in the plaintiff's house, to secure the repayment of a sum of 80*l.* and interest thereon at 30 per cent., the principal sum to be paid, together with the interest then due, by equal monthly payments of 5*l.* 6*s.*, the first payment to be made on November 1, and the remainder on the first day of every succeeding month until the whole of the said

sum and interest should be fully paid. This bill of sale was in accordance with the form in the schedule to the Bills of Sale Act, 1883.

The plaintiff also at the same time gave the defendants a promissory note in the following terms:—

"London, September 30, 1885.

"B/Sale. 18 mos.

"95*l.* 12*s.* No. 56423.

"I promise to pay the London and Westminster Loan and Discount Company, Limited, or order, the sum of 95*l.* 12*s.* for value received, by instalments in manner following:—that is to say, the sum of 5*l.* 6*s.* on the 1st day of November, and the sum of 5*l.* 6*s.* on the 1st day in every succeeding month until the whole of the said 95*l.* 12*s.* shall be fully paid, and in case default is made in payment of any one of said instalments the whole of the said 95*l.* 12*s.* remaining unpaid shall become due and payable."

The plaintiff having made default in payment of one of the instalments, the defendants entered and seized the goods assigned by the bill of sale.

Denman, J., at the trial, held that the bill of sale was void on the authority of *Simpson* v. *Charing Cross Bank* (1), and the jury assessed the plaintiff's damages at 400*l.*

The defendants moved for a new trial on the ground that the learned judge had misdirected the jury in telling them that the bill of sale was void.

The Divisional Court held that they were bound by the decision in *Simpson* v. *Charing Cross Bank* (1), and refused to grant a new trial.

The defendants appealed.

Channell, Q.C. (*Melsheimer*, with him), for the defendants. The bill of sale is not rendered void by reason of the promissory note having been given. It was given as a collateral security merely, and there is nothing in the statutes which prohibits the grantee from taking such collateral security for the payment of the sum secured by the bill of sale, so long as the pledge of chattels is not

(1) 34 W. R. 568.

1887

COUNSELL v. LONDON AND WESTMINSTER LOAN AND DISCOUNT CO.

affected. The question here arises between grantor and grantee; the right of any third party, such as an execution creditor or trustee in bankruptcy, is not affected. It is submitted that the decision in *Simpson* v. *Charing Cross Bank* (1) was wrong. The two documents are not of necessity to be read together. This note is assignable as a negotiable instrument, and on default being made by the maker in payment of one of the instalments, an indorser would be liable for the whole amount: *Carlon* v. *Kenealy*. (2) It forms no part of the consideration for the bill of sale; nor is it a "defeasance, condition, or declaration of trust," within s. 10 of the Bills of Sale Act, 1878. It is not affected by any provision of the Bills of Sale Acts. *Ex parte Odell, In re Walden* (3) does not apply here, because the facts shew that the bill of sale and the promissory note were given as separate and independent documents.

Crispe, (*MacIntyre, Q.C.*, with him), for the plaintiff. The bill of sale and promissory note form part of the same transaction, and are evidence of one contract between the grantor and grantees. The promissory note imposes an additional condition upon the grantor, under which the grantees can obtain payment of the whole sum in the case of the grantor making default in payment of one instalment. They could not obtain that advantage under the bill of sale. It is such a condition as s. 10, subs. 3, of the Act of 1878 requires should appear in the bill of sale and be registered. *Ex parte Southam, In re Southam* (4), shews that a condition not relating to the goods required registration under the Bills of Sale Act, 1854. The promissory note is an agreement to pay under certain circumstances a larger rate of interest on the principal sum than the rate of interest payable under the bill of sale. The bill of sale is therefore void.

Channell, Q.C., replied.

Cur. adv. vult.

Aug. 11. LORD ESHER, M.R. In this case the question is whether a bill of sale given by the plaintiff to the defendants is good or bad? In one sense the bill of sale is drawn in accord-

(1) 34 W. R. 568.
(2) 12 M. & W. 139.
(3) 10 Ch. D. 76.
(4) Law Rep. 17 Eq. 578.

ance with the form in the schedule of the Bills of Sale Act, 1882, and therefore, if it stood alone, no difficulty would arise with respect to it. But the defendants, who took the bill of sale in that form, at the same time, and as part of the same transaction, took from the plaintiff a promissory note by which the plaintiff promised to pay them 95*l.* 12*s.*—the exact sum representing the principal and interest secured by the bill of sale—payable by exactly the same instalments and on the same days as in the bill of sale. The promissory note also stipulated that "in case default is made in payment of any one of the said instalments the whole of the said 95*l.* 12*s.* remaining unpaid shall become due and payable."

Now a bill of sale is the contract of the parties reduced into writing. That contract may be contained in two documents or only in one. Whether the contract is contained in two documents or only in one must be a question of fact. Having regard to the identity of the figures and dates in the two documents in question here, and to the fact that beyond doubt both documents relate to the same transaction, I come to the conclusion that the parties have reduced their contract into writing, contained both in the bill of sale and the promissory note. I cannot doubt that there was but one contract between the parties contained in the two documents. Now one of the documents has been registered; the other has not. It is necessary to consider whether the unregistered has any effect upon the registered document. Suppose all the money due on the promissory note became payable at once, and was paid—suppose the note was discounted and got into the hands of a holder for value, and he received payment of the whole sum due on it—I should say that in equity, if not in law, it would be impossible after that had happened to say that the bill of sale could have any effect. Therefore, by payment of the promissory note, the bill of sale would be defeated. It would no longer be available as a security against the grantor. Under these circumstances, therefore, I am of opinion that the promissory note constitutes a defeasance of the bill of sale within the meaning of s. 10 of the Bills of Sale Act, 1878, and that defeasance not being contained in the body of the bill of sale, or written upon the same paper, the registration of the bill of sale is void.

1887

COUNSELL v. LONDON AND WESTMINSTER LOAN AND DISCOUNT CO.

LINDLEY, L.J. I am of the same opinion. The effect of the promissory note is to render the goods, which are the security of the bill of sale, liable to be redeemed upon the performance of a condition not contained in the bill of sale, but in another unregistered document; and by s. 10 of the Act of 1878, that condition ought to have been contained in the body of the bill of sale or written on the same paper. I am of opinion that the promissory note constitutes a defeasance within s. 10, and that as the promissory note is neither contained in the body of the bill of sale, nor written on the same paper, the bill of sale is bad. The appeal, therefore, must be dismissed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *G. J. Vanderpump & Son.*
Solicitor for respondent: *Thomas Young.*

W. A.

July 25.

BLAIR AND ANOTHER *v.* CORDNER. (1)

Solicitor—Bill of Costs—Interest on Disbursements and Costs—Demand from Client—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 5, *General Order VII.*

By General Order VII. under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5 . . . . the interest which a solicitor is entitled to recover under the Order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation—and it is provided that a solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client.

A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill:—

Held, that the solicitor was entitled to such interest.

APPEAL from the City of London Court. The plaintiffs, a firm of solicitors, sued the defendant for 1*l.* 1*s.* 2*d.*, being interest at the rate of 4 per cent. per annum, commencing one month

(1) Before Lord Esher, M.R., Lindley, and Lopes, L.JJ., sitting as a Divisional Court.

after the delivery to the defendant of the plaintiffs' bill of costs and disbursements, upon 89*l.* 13*s.* 10*d.* the amount of such bill of costs and disbursements which was allowed on taxation. It appeared that on December 3, 1886, the plaintiffs delivered to the defendant a bill amounting to 133*l.* 18*s.* 3*d.* At the time of so doing they did not claim interest. The bill was taxed, and on March 30, 1887, the master certified that 89*l.* 13*s.* 10*d.* was due, and made an order that the defendant should pay this sum to the plaintiffs within twenty-one days from the date of service of the order. The order was served on March 31, and on April 21 the defendant in compliance therewith paid the plaintiff the sum of 89*l.* 13*s.* 10*d.* On April 22 the plaintiffs for the first time claimed from the defendant 1*l.* 1*s.* 2*d.*, being interest on 89*l.* 13*s.* 10*d.* at 4 per cent. from January 3, or one month from December 3, the date of the delivery of the bill of costs and disbursements, to April 22. The judge found a verdict for the plaintiffs.

Gould, for the defendant. The plaintiffs have no right to interest under General Order VII. (1) Their right depends on a "demand from the client." This may mean either a demand of the amount of the bill, or a specific demand of interest at the statutable rate. Mere delivery of the bill is not a demand, and there was no demand, either of the amount due, or of interest at the statutable rate upon that amount as reduced by taxation, till after payment of the taxed bill.

De Sausmarez, for the plaintiffs. The right of the plaintiffs to interest commenced under General Order VII. one month after

(1) Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5: "Any General Order under this Act may authorize and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, to be ascertained by taxation or otherwise, and the allowance of interest." General Order VII.: "A solicitor may accept from his client and a client may give to his solicitor security for the amount to become due to the solicitor for business to be transacted by him and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. A solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client."

1887

BLAIR v. CORDNER.

delivery of their bill. This delivery was a statutable "demand." The order does not make it necessary to claim interest, and by its terms interest is payable on the true amount of the bill as fixed by taxation. The plaintiffs claimed interest as soon as the amount on which it was payable had been ascertained by taxation under General Order VII., and had become payable under the Master's order.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. The question is as to the meaning of General Order VII. It is suggested that to send in a bill is not to demand payment of it, but this is a fanciful view. The words "from demand" mean "from sending in the bill." From the date of sending in the bill a solicitor becomes entitled under the Order to interest at 4 per cent. on the true amount of the bill as ascertained by taxation. I do not say what might have been the result if the solicitor had postponed claiming interest for an unreasonable time, but here he practically claimed the interest as soon as it had become due, and his title to it is clear.

LINDLEY, L.J. I agree. The true construction of General Order VII. is, in my opinion, that the solicitor is entitled to claim 4 per cent. interest on the taxed costs at any time before they have been paid. Here in effect when the taxed costs were tendered he claimed interest upon them.

LOPES, L.J., concurred.

Appeal dismissed.

LORD ESHER, M.R., stated that the Court had conferred with the judges sitting in the other Division of the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) and that they agreed with the decision.

Solicitors for plaintiffs: *Blair & Girling.*
Solicitors for defendant: *Burn & Berridge.*

H. D. W.

PALLISER *v.* GURNEY. 1887

Husband and Wife—Married Women—Contract—Separate Property—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 3. *July* 18.

Sect. 1, sub-s. 2, of the Married Women's Property Act, 1882, does not make a married woman capable of rendering herself liable in respect of her separate property on any contract unless she has some separate property at the time the contract is made.

In an action against a married woman to recover the price of goods sold and delivered to her:—

Held, that the onus was on the plaintiff to shew that the defendant had separate property at the time she made the contract.

MOTION by way of appeal from a decision of the judge of the City of London Court. The action was brought against a married woman, without joining her husband as defendant, for goods sold and delivered to her in 1885. At the trial the sale and delivery of the goods to the defendant were admitted, but the plaintiff offered no evidence to shew that the defendant was possessed of any separate property when the goods were ordered and supplied, and the learned Commissioner gave judgment for the defendant, but gave leave to appeal.

Hilbery, for the plaintiff. The Court below followed the decision of Pearson, J., in *In re Shakespear, Deakin* v. *Lakin* (1); but it is submitted that the learned judge's view is opposed to the general intention of the Married Women's Property Act, 1882, and ought not to be upheld. That intention was to render a married woman personally liable upon contracts entered into by her in her own name, independently of the question whether or not she had separate property at the time she entered into the contract. If that be not the true intention of the Act, sub-s. 3 of s. 2 (which provides that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind, her separate property, unless the contrary be shewn"), throws the onus upon the defendant of proving that she had not separate property when the contract was entered into. Here the defendant did not prove that, and judgment should have been entered for the plaintiff.

P. Gye, for the defendant, was not heard.

(1) 30 Ch. D. 169.

1887

PALLISER v. GURNEY.

LORD ESHER, M.R. This judgment must be affirmed. The defendant was sued for wine ordered by her in her own name, as Mrs. A. Gurney; and she was sued without joining her husband as defendant. The question is, whether the order, which would be a binding contract if she were a feme sole, binds her as a married woman; and this depends on the construction of the Married Women's Property Act, 1882. It is said that this statute makes a married woman personally liable upon contracts entered into by her in her own name; but if that was the intention it is not expressed, though it might easily have been expressed. If there are any words in the statute which express that intention they are to be found in sub-s. 2 of s. 1: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," &c. The section limits the capacity of the married woman to bind herself by the words "in respect of and to the extent of her separate property." It is clear that she is not given an unlimited capacity to enter into and be bound by any contract. Moreover, this point was considered by Pearson, J., in *In re Shakespear, Deakin* v. *Lakin* (1), and in giving judgment he said: "In my opinion, according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it." With that statement I entirely agree. As to the argument founded on sub-s. 3, that sub-section presupposes the existence of separate property, and the capacity of the married woman to contract which arises therefrom, and provides that, if that capacity exists, then the contract shall bind her separate property unless the contrary be shewn.

LINDLEY, L.J. I am of the same opinion. The true construction of s. 1 of the Married Women's Property Act, 1882, is to confer upon married women who have separate property a power to contract with reference to it. Sub-s. 2 of s. 1, which is the clause giving this power, is an enabling clause giving a power of contracting in respect of and to the extent of the separate

(1) 30 Ch. D. 169.

property, and it is obvious that, unless the separate property exists, the married woman is not bound by the contract; and, therefore, those who assert the existence of a contract binding the married woman must first shew the existence of the separate property. Sub-s. 3 presupposes that some contract binding separate property has been entered into—that is presupposes the existence of separate property at the time of making the contract, for otherwise there is no power to contract—and then provides that such contract shall bind her separate property, that is, that her separate property shall be liable to her general engagements, a matter about which there was some question before the passsing of the Act. I agree with the decision of Pearson, J., in *In re Shakespear, Deakin* v. *Lakin*. (1) It therefore follows that the plaintiff failed in making out his case, and that the judgment appealed from must be affirmed.

LOPES, L.J. I am of the same opinion. The disability of a married woman to contract was removed by the Married Women's Property Act, 1882, but only to this extent—that she may now enter into a binding contract in respect of her separate property. If she has no separate property she still cannot contract. I entirely agree with the decision of Pearson J., in *In re Shakespear, Deakin* v. *Lakin* (1), that the contract which is to bind future separate property must be entered into at a time when the married woman has existing separate property. Sub-s. 3 does not aid the argument for the plaintiff, as it clearly presupposes the existence of separate property. I think, therefore, that to entitle the plaintiff to succeed he must prove the existence of some separate property at the time of entering into the alleged contract. The plaintiff in this case failed in this respect, and the judgment for the defendant was right.

Appeal dismissed. (2)

Solicitor for plaintiff: *R. Chambers.*

Solicitors for defendant: *G. & H. Brandon.*

(1) 30 Ch. D. 169.

(2) In this case the Master of the Rolls and the Lords Justices were sitting as a Divisional Court of the Queen's Bench Division.

W. A.

1887
July 22.

HUGHES *v.* FINNEY.

Practice—County Court—Remitted Issue—Appeal—New Trial—County Court Act, 1856 (19 & 20 *Vict. c.* 108), *s.* 26—*Order LIX., r.* 9.

Order LIX., r. 9, does not apply to cases in which the issues in an action are remitted to a county court for trial under 19 & 20 Vict. c. 108, s. 26. In such cases, therefore, an application for a new trial must still be by motion for a rule nisi under the old practice.

Motion by way of appeal from the judgment entered upon the verdict of the judge of the Manchester County Court in an action, the issues of which were remitted for trial in the county court under 19 & 20 Vict. c. 108, s. 26.

The county court judge found for the defendant on the remitted issues on May 16, 1887; and on the same day judgment was entered for the defendant in the Manchester District Registry upon the certificate of the registrar of the county court. On May 20 the plaintiff gave an eight days' notice of motion under Order LIX., r. 9, to enter judgment for himself, or for a new trial, on the ground of misdirection.

R. T. Reid, Q.C. (*Lush Wilson,* with him), for the defendant, took the preliminary objection that Order LIX., r. 9, did not apply to cases in which the issues were remitted for trial in the county court; that the motion should have been for a rule nisi under the old practice, and that the appeal was now out of time.

S. Hall, for the plaintiff.

Lord Esher, M.R. It is quite clear that this is an appeal from a judgment of the High Court. The ground of the appeal is that the judgment has been obtained by wrong means, namely, misdirection, but it is clear that what is appealed against is the judgment. The judgment is a judgment of the High Court, for the action was brought and still remains in the High Court, though the issues have been sent down to the county court for trial. Whether or not the action may be said to have been a county court action temporarily, and whether or not it ever left the High Court, it returned to the High Court immediately after

the trial, and the judgment was entered in the High Court. All the county court judge had to do with the action was to try the issues. The contention on behalf of the appellant must therefore be that Order LIX., r. 9, applies to appeals against judgments of the High Court, but it is clear on the words of the rule that it does not apply to such appeals.

LINDLEY, L.J. This is not an appeal from a county court because the judgment appealed against is a judgment in the Queen's Bench Division, and is therefore not within Order LIX., r. 9.

LOPES, L.J. In this action the writ was issued in the High Court, and up to the time that the issue was remitted all the pleadings were in the High Court. The issues were remitted to the county court for *trial* only under 19 & 20 Vict. c. 108, s. 26, but under that section the action comes back again to the High Court for judgment, and all subsequent proceedings are in the High Court. It is admitted that this appeal is out of time unless Order LIX., r. 9, can be made to apply to it; but the words of that rule are plain: "The following rules shall apply to appeals to the Queen's Bench Division from county courts," and this appeal is an appeal from the High Court. In my opinion Order LIX., r. 9, applies only to appeals mentioned in s. 45 of the Judicature Act, 1873, namely, appeals from inferior courts to be determined by Divisional Courts.

LORD ESHER, M.R. It follows from our decision that these cases are not in the Crown Office, nor subject to the Crown Office Rules.

On the application of *S. Hall* the Court extended the time for applying for a rule nisi, and granted a rule. The case was then heard on the merits and the appeal dismissed. (1)

Solicitors for plaintiff: *Chester & Co., for Chapman, Roberts, & Beck, Manchester.*

Solicitors for defendant: *Grundy, Kershaw, & Co.*

(1) In this case the Master of the Rolls and the Lords Justices were sitting as a Divisional Court of the Queen's Bench Division.

W. A.

1887
Aug. 6, 8.

CROFTS, APPELLANT; TAYLOR, RESPONDENT.

Revenue—Excise—Dilution of Beer by Publican—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 8.

By s. 8, sub-s. 2, of the Customs and Inland Revenue Act, 1885, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification." . . . . The appellant, a publican, had in his cellar a cask of beer supplied by a firm of brewers, and also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, and filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing (except the finings) was added to the beer.

On appeal against a conviction for "diluting" beer under the above section:—

Held, that the mixing of the two kinds of beer amounted to a dilution of the stronger beer, and that the appellant was properly convicted.

CASE stated by a metropolitan police magistrate.

1. The appellant was summoned to answer an information exhibited by the respondent, an officer of inland revenue, which charged him for that he, being a retailer of beer, did on February 16, dilute certain beer contrary to 48 & 49 Vict. c. 51, s. 8.

3. The appellant was the licensed occupier of a public-house, and was a retailer of beer.

4. On February 16 he had in his cellar a puncheon containing 72 gallons of beer, which he had purchased of Messrs. Barclay & Co., the brewers. He had also in his cellar 36 gallons of small beer, which he had purchased of Mr. Bishop, a dealer in beer at Haggerston. The beer which he had purchased of Messrs. Barclay was of the density of 1013·00, and of the original gravity of 1056·27, and contained 10·30 of proof spirit. The beer which he had purchased of Mr. Bishop was of the density of 1002·52, and of the original gravity of 1021·79, and contained 4·62 of proof spirit. The difference in gravity is equivalent to four gallons of water.

5. By the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 4, "beer" is defined to include any description of beer which contains "more than two per centum of proof spirit."

6. On February 16 the appellant took about 19½ gallons of Messrs. Barclay's beer out of the puncheon which contained 72 gallons, and he took 18 gallons out of a cask of Mr. Bishop's beer, and poured the same into the puncheon of Messrs. Barclay & Co.'s beer, and added thereto one gallon of finings. The two beers mixed in the puncheon shewed on analysis a density of 1010·42, and an original gravity of 1045·84, and proof spirit 8·56.

7. Neither water nor any other matter or thing (except finings for the purpose of clarification, as allowed by law) was added to the beer, and the effect of mixing the two beers was to lower the strength of Messrs. Barclay's beer to the extent above mentioned.

8. It was contended on behalf of the appellant that what was done was not a dilution of beer, and that the blending or mixing of two beers was not a dilution of beer within the meaning of s. 8, sub-s. 2.

9. The respondent contended that the mixing of two beers of different qualities amounted to a dilution of the stronger.

10. The magistrate was of opinion that, the word "dilute," being defined by the Imperial Dictionary as "to weaken, to reduce the strength or standard of," the stronger beer was diluted by adding to it the weaker beer, and convicted the appellant.

The question for the opinion of the Court was, whether such mixing or blending of beers was a dilution within the meaning of the statute. (1)

(1) By the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 8, it is enacted as follows:—

"(1.) A brewer of beer for sale shall not adulterate beer, or add any matter or thing thereto (except finings for the purpose of clarification or other matter or thing sanctioned by the Commissioners of Inland Revenue) before the same is delivered for consumption, and any beer found to be adulterated or mixed with any other matter or thing (except as aforesaid) in the possession of a brewer of beer for sale shall be forfeited, and the brewer shall incur a fine of fifty pounds.

"(2.) A dealer in or retailer of beer shall not adulterate or dilute beer, or add any matter or thing thereto (except finings for the purpose of clarification), and any beer found to be adulterated or diluted or mixed with any other matter or thing (except finings) in the possession of a dealer in or retailer of beer shall be forfeited, and he shall incur a fine of fifty pounds.

By s. 4: "The term 'beer' in the Inland Revenue Act, 1880, shall be

1887

CROFTS v. TAYLOR.

Aug. 6. *Reid, Q.C.*, and *Bodkin*, (*Poland*, with them), for the appellant. The Customs and Inland Revenue Act of 1885 was an enactment affecting the excise and other departments of the revenue, but not making any alteration in the general law. The object of s. 8, sub-s. 2, is to prevent the dilution of beer with water by the publican, as that would be to increase the bulk of the duty-paid beer by the addition of a substance which has not paid duty. But in the present case all the beer, including the small beer used by the appellant, had paid duty before it got into his hands, and the revenue was not in any way affected by what he did in mixing the two kinds of beer. Mixing is not dilution. If the effect of his act was to cheat the purchaser the appellant could be proceeded against under different statutes, or at common law, but he cannot be convicted under an Act which was not meant to prevent fraud, but was passed for fiscal purposes only. If the conviction is right, a publican cannot sell to a customer a glass of "half-and-half," if one of the two kinds of beer composing the mixture is stronger than the other, as it always is.

Sir E. Clarke, Q.C., S.G., and *R. S. Wright* (*Sir R. E. Webster, Q.C., A.G.*, with them), for the respondent. Effect must be given to the plain and obvious meaning of the language of the section, otherwise the object of the Act, which protects the public as well as the revenue, will be defeated. The appellant has diluted beer; he has rendered it weaker or thinner by the addition of a much weaker beer; and there is no authority for saying that the dilution can only be a dilution with water. It is intended that the retailer shall sell the beer to the public just as he gets it from the brewer, and therefore the retailer is prohibited from any dilution of the beer in his cellar. Having regard to the wide definition of "beer" in s. 4 of the Act, the appellant must contend that beer may lawfully be diluted to any extent with weaker beer, provided that something more than two per cent. of proof spirit is left in it.

Reid, Q.C., in reply.

Cur. adv. vult.

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construed to extend to any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time shall be found to contain more than two per centum of proof spirit.

1887

CROFTS v. TAYLOR.

Aug. 8. GROVE, J. I have come to the conclusion that the conviction was right. The question turns mainly on s. 8 of the Act, and it is to be noted that there is a marked difference between its two sub-sections. The first sub-section applies to the brewer, who is not to adulterate beer, or to add any matter or thing to it, except finings; while the second sub-section, which is applicable to the retailer, prohibits him from adulterating or diluting it or adding any other matter or thing to it. There is an obvious reason why in the one sub-section dilution should be specified, while it is not mentioned in the other; for brewers, who brew beer of different strengths, must in a sense dilute it, either with water or by blending it with other beer; and this is perfectly legitimate, provided that it is not done in such a manner as to impose on the excise or cheat their customers. But the retailer is supposed to buy his beer ready brewed, and in many cases he is the tenant of a "tied" house, and can only sell the beer of one brewer; the policy of the Act is therefore that, after he has purchased the beer for retailing, it shall remain unaltered, at any rate that it shall not be diluted, so that the purchaser may know what he is drinking. Here the defendant undoubtedly did dilute beer, for he put a weaker and inferior beer into the stronger so as to reduce its specific gravity from 10 to 8; if this is not dilution, I am quite unable to say what is; what he did was to make Barclay's beer weaker or thinner, and that is the fair ordinary meaning of dilution. Mr. Reid practically said in his argument that the only dilution under the section was dilution with water; but the beer which the retailer pours into a cask of stronger beer may itself be but little stronger than water; and therefore if Mr. Reid is right in his contention the retailer might first dilute a quantity of small beer as much as he pleased, and then pour what is practically water into the stronger, provided that he does not reduce the quantity of proof spirit in the mixture below two per cent. It is said that this practice does not affect the revenue, and, that being so, that it is not touched by this Act which is itself only what is called a "money bill," and as such does not effect any alteration in the general law of the land; but I cannot accede to this contention. It may, I think, affect the revenue indirectly, for if publicans were

1887

CROFTS v. TAYLOR.

Grove, J.

allowed to make their own mixtures, the revenue would in all probability suffer very much. But we are not bound to consider that, for if the words of the Act are clear, we must adopt them, and give the legislature credit for meaning what it says. Nor do I accede to the suggestion that no alteration is ever made in the general law by a money bill; my own experience is adverse to that contention. I think that we should be flinching from the words of the Act and should be giving a fictitious construction to it, if we gave any but the ordinary dictionary interpretation to the language of the section. It has been objected that this interpretation will prevent a publican from selling to a customer a glass containing two kinds of beer of different strengths, such as what is popularly known as "half-and-half," but I do not accede to that view; the publican might sell the two kinds of beer in two different glasses and allow the customer to mix them, and even if the publican mixed them himself, assuming that he did it in the presence of the customer, I am clearly of opinion that he would be acting as the agent of the customer in so doing. But even if the Act would have that effect, the argumentum ab inconvenienti cannot be allowed to prevail, and we cannot go behind the plain meaning of the plain language which the legislature has used.

HUDDLESTON, B. I agree, although I have had some doubts during the progress of the argument. I thought at first that this being merely a money bill, there could be no loss to the revenue through the mixing of two kinds of beer, both of which had already paid duty; but I am satisfied that we have nothing to do with the general object of the enactment if the words used are clear; they are clear here, and we ought not to enter upon a refined consideration of the question whether they carry out the object of the statute. I am also satisfied on another point, on which I had some doubt, that the Act does not prevent the sale to a customer of a glass of mixed beer; it is directed against the manipulation of large quantities of beer in the publican's cellar, and not against the mixing of small quantities in a glass in the customer's presence. The real question here is the meaning of the word "dilute," and giving it its ordinary dictionary meaning

of "to thin, weaken, reduce the strength of," I think the appellant clearly diluted Barclay's beer. There is no manifest incongruity in giving this meaning to the word, and the context clearly shews that this construction is right.

1887

CROFTS v. TAYLOR.

Judgment for the respondent.

Solicitors for appellant: *Peckham, Maitland, & Peckham.*
Solicitor for respondent: *Solicitor for Inland Revenue.*

W. J. B.

THE QUEEN ON THE PROSECUTION OF THE ROYAL AGRICULTURAL HALL COMPANY *v.* THE ASSESSMENT COMMITTEE OF ST. MARY, ISLINGTON.

June 25.

Poor-rate—Assessment—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 47—*Provisional List—Alteration in Value of Hereditament during Year—Diminution of Income.*

By s. 47 of the Valuation (Metropolis) Act, 1869, "if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value," the overseers are, upon the written requisition of any ratepayer, to send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament, and upon default of the overseers the assessment committee are to appoint a person to make such provisional list:—

Held, that the words "from any cause increased or reduced in value," are not confined to an increase or reduction caused by structural alterations in the hereditament, that a substantial diminution in profits and income is within the meaning of the section, and that where a primâ facie case of such a diminution is made out the assessment committee is bound, on default of the overseers, to appoint a person to make out a provisional list.

RULE calling on the defendants, the assessment committee of St. Mary, Islington, to shew cause why a writ of mandamus should not issue commanding them to appoint a person to make a provisional list for that parish containing the gross and rateable value of the Royal Agricultural Hall as reduced since the making of the existing valuation list, as required by the Valuation (Metropolis) Act, 1869, s. 47. (1)

(1) By s. 47 of the Metropolis (Valuation) Act, 1869 (32 & 33 Vict. c. 67), "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is

1887

THE QUEEN v. ASSESSMENT COMMITTEE OF ST. MARY'S, ISLINGTON.

The proprietors of the Royal Agricultural Hall had, by a written requisition, called upon the overseers of the parish of Saint Mary, Islington, to make a provisional list containing a reduced valuation of the hall; the ground of the application being that, owing to a falling off in the profits, the annual value of the property had largely decreased since the making of the valuation list then in force. The overseers refused to make a provisional list on the ground that under s. 47 of the Valuation (Metropolis) Act, 1869, mere alteration in value was insufficient, and that the applicants must shew a structural alteration in the hereditament itself to bring themselves within the meaning of that section. The assessment committee, when applied to, refused for the same reason to appoint under sub-s. 2 of s. 47 a person to make a provisional list.

Jelf, Q.C., and *J. V. Austin*, for the defendants, shewed cause against the rule. If the applicants are right, the practical result will be that, notwithstanding the fact that a quinquennial valuation list is in force, any ratepayer whose profits fall off will be able to compel the assessment committee to make a provisional list and so defeat the object of the Act. Sect. 47 was intended to obviate such a state of things, and render it necessary for the applicants to shew a structural or quasi-structural alteration in the hereditament affecting its value. The words in that section "if the value of any hereditament . . . . is from any cause increased or reduced" mean from any cause ejusdem generis with the "addition thereto or erection thereon of any building;" a

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from any cause increased or reduced in value, the following provisions shall have effect:

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

"(2.) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list . . . ."

mere alteration in value caused by reduced profits or diminished rents would be insufficient. Where plain proof can be given at once (as by mere inspection of the hereditament) without any judicial inquiry, the machinery of s. 47 can be resorted to. The decision in *Reg.* v. *Assessment Committee of Poplar Union* (1) is at first sight in favour of the applicants, evidence of a continuous falling off in dock receipts having been held sufficient to shew an alteration in the rateable value of the docks; but that was an appeal against a supplemental list made under s. 46, the language and application of which are very different from the language and application of s. 47. The proper course for the applicants to adopt was to have their property inserted in a supplemental list at the end of the year under s. 46.

[They also cited *Reg.* v. *New River Co.* (2); *Reg.* v. *Overseers of St. Mary, Bermondsey.* (3)]

Castle, for the prosecutors, was not called on.

LORD COLERIDGE, C.J. I understand that a primâ facie case has been made out of a reduction in value of the premises of the applicants, and that they have applied under s. 47 to have a fresh valuation made and the premises inserted in a provisional list. It has been suggested to us that s. 47 is really the same as s. 46, and it has been argued at considerable length that great inconveniences would arise from applying the provisions of s. 47 from time to time wherever a primâ facie case for a reduction in value has been made out; whether this is so I am not prepared to say. These statutes deal with practical matters, and their interpretation must be governed by practical considerations. It is manifest that where a standard of rateable value is set up for a fixed time, common justice as the correlative of legislation requires a means of correcting great changes in value. As to the beginning of each year, the parish officers are required by s. 46 to make, when necessary, a supplemental list at that time, and to insert in it the alterations in rateable value. But as there may be individual cases of change of value calling for reduction or increase within the year, s. 47 was added, which

(1) 13 Q. B. D. 364. (2) 4 Q. B. D. 309.
(3) 14 Q. B. D. 351.

1887

THE QUEEN v. ASSESSMENT COMMITTEE OF ST. MARY'S, ISLINGTON.

Lord Coleridge, C.J.

provides that, where the value of the hereditament is increased by structural additions or alterations, or is from any cause increased or reduced in value, certain steps are to be taken for the making of a provisional list. The question here and in every such case is, is there a primâ facie case calling on the assessment committee to hear and determine the question of value? They may decide either in favour of or against the applicants upon the question of reducing the assessment, but I think they must decide it. This is the plain and simple construction of the Act of Parliament. I adopt with entire satisfaction the words of Cockburn, C.J. in *Reg.* v. *New River Co* (1), "Our attention has been drawn to inconveniences which would result from a literal construction of s. 46, but I do not think we are at liberty to speculate upon the possible consequences of so applying it." It is true that that was a decision under s. 46 of this Act, but I agree with the principle there laid down; the language of the judgment is precise and excellent, and entirely expresses my view. The question of inconvenience is one for the legislature and not for us; in our view it would be unjust if a reduction in profits amounting to 2000*l.* a year were not to be taken into consideration by the assessment committee. In *Reg.* v. *Poplar Union* (2) the Court of Appeal decided that a depreciation in value caused by a falling off in the amount of dock dues was to be taken into account in framing a supplemental list, and although that was also a decision under s. 46, I think that the principle is applicable to the case before us. Whether we look at this Act apart from or by the light of authority, this mandamus must issue.

DAY, J., concurred.

Rule absolute.

Solicitors for prosecution: *Kingsford, Dorman, & Co.*
Solicitors for defendants: *Lewis & Sons.*

(1) 4 Q. B. D. at p. 312. (2) 13 Q. B. D. 364.

W. J. B.

THE QUEEN ON THE PROSECUTION OF JAMES SMITH *v.* THE VESTRY OF ST. GEORGE'S, SOUTHWARK.

1887
July 20.

Metropolis Management Acts—Vestry, Officer of—Superannuation Allowance—Discretion as to Amount—29 Vict. c. 31, *ss.* 1, 4.

A metropolitan vestry has a discretion under 29 Vict. c. 31, s. 1, to grant or to refuse a superannuation allowance to a retiring officer, but, if an allowance be granted, the vestry has no discretion as to the amount, which must be in accordance with the scale prescribed in s. 4.

RULE calling upon the vestry of St. George's, Southwark, to shew cause why a mandamus should not issue commanding them to pay to James Smith thirty-sixtieths of his salary as a superannuation or retiring allowance. James Smith had been for thirty years inspector of nuisances to the vestry; his salary was 180*l.* per annum, and he claimed to be entitled upon his retirement to a superannuation allowance of 90*l.* a year, being thirty-sixtieths of such salary; upon his retirement the vestry allowed him a pension of 25*l.* per annum.

By the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 62, "The . . . . vestry of every parish mentioned in Schedule A. to this Act shall appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the . . . . vestry may think fit."

By 29 Vict. c. 31, s. 1, "The vestry of any parish . . . . within the metropolis . . . . may, at their discretion, grant to any officer . . . . who shall become incapable of discharging the duties of his office with efficiency by reason of permanent infirmity of mind or body, or of old age, upon his resigning or otherwise ceasing to hold his office, an annual allowance not exceeding in any case two-thirds of his then salary, regard being had to the scale of allowances hereinafter contained. . . . ."

By s. 4, "Subject to the provisions herein contained, the allowance to be granted after the commencement of this Act to

1887

THE QUEEN v. VESTRY OF ST. GEORGE'S, SOUTHWARK.

persons who shall have served in an established capacity as officers as aforesaid . . . . shall be as follows :—

"To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the salary and emoluments of his office;

"And in like manner an addition of one-sixtieth in respect of each additional year of such service until the completion of a period of service of forty years, when the annual allowance of forty-sixtieths may be granted; and no addition shall be made in respect of any service beyond forty years. . . . ."

By s. 5, "When for the due and efficient discharge of the duties of any office, professional or other peculiar qualifications not ordinarily to be acquired in the vestry or board's service are required, and any person having such qualifications shall have been or may be appointed thereto beyond the age of thirty years, any vestry or board may, by order, direct that when any person now holding or who may hereafter be appointed to such office shall retire from their service, a number of years, not exceeding ten, to be specified in the said order, shall, in computing the amount of the superannuation allowance which may be granted to him under this Act, be added to the number of years during which he may have actually served."

Lumley Smith, Q.C. (*Avory*, with him), shewed cause. The amount of the superannuation allowance is wholly in the discretion of the vestry; they are not compelled to give any at all, and the effect of s. 4 is to limit the maximum amount which can be granted to two-thirds of the salary of the officer at the time of his retirement. Under s. 57 of the Metropolis Management Act, 1855, the vestry has power to revoke its previous vote, and therefore it can, at its discretion, take away or reduce a retiring allowance after it has once been granted. While an officer is in the employment of the vestry his emolument is, by s. 62 of the Act of 1855, wholly in their discretion; and it is only reasonable that they should have the same discretionary power over the amount of his pension or retiring allowance.

[He cited *Marchant* v. *Lee Conservancy Board.* (1)]

(1) Law Rep. 9 Ex. 60.

1887

THE QUEEN v. VESTRY OF ST. GEORGE'S, SOUTHWARK.

Morton Smith, in support of the rule. The language of s. 4 is compulsory, not merely permissive; and if a pension is granted at all, it must be according to the scale laid down in that section. It is clear from s. 5 what was the intention of the legislature; a retiring officer who has served upwards of ten years "shall" have a pension at the rate of one-sixtieth of his salary for each year of service, not exceeding as a maximum in any case two-thirds of his salary; and in cases under s. 5 he "may," although he has not served his full time, be credited with a certain number of years of service not actually performed by him, in order that he may have the benefit of the maximum retiring allowance.

STEPHEN, J. I am of opinion that this rule must be made absolute. The point is a short one, and does not admit of much argument, and we have to put such an interpretation upon this Act as will explain it and make it consistent as a whole. Its meaning seems to be this, that the vestry has a discretion whether a pension shall be granted or not, but that if they do grant it, it must be according to the scale fixed by the statute, a scale which it is more convenient to settle definitely beforehand than by vote upon each separate occasion when a pension is voted. This is an intelligible and reasonable principle of legislation, to allow the vestry a discretion as to the granting of a pension at all, but not to leave the amount of the pension, if granted, to be determined in an assembly of that nature, where it would be treated as a subject of popular discussion; it appears, indeed, upon affidavit in the present case, that proposals were made to give Mr. Smith a pension varying from 5*s.* to 80*l.* a year. It is most important that each party should know what is its exact position and prospects, and this section enables them to be estimated with accuracy. I do not know what meaning is to be attached to the words "regard being had to the scale," unless they mean that the pension, if granted, is to be upon the scale laid down in the section; if the contention of the vestry is right, it would have been easy to say the pension should "not exceed" the scale, but the section uses the imperative words, "shall be as follows." Our interpretation of s. 4 is to some extent strength-

1887

THE QUEEN v. VESTRY OF ST. GEORGE'S, SOUTHWARK.

Stephen, J.

ened by the language of s. 5, which gives power in certain cases to add a number of years not exceeding ten to the actual period of service of the retiring officer, provided that the maximum allowance of two-thirds of the salary is not exceeded; this shews that the amount of the pension was to follow the scale according to the length of service. The provisions of s. 6 are also material; for there a discretionary power is given to the vestry, under circumstances different from those in the present case, to give a retiring servant a gratuity "not exceeding" three months' pay for every two years of service, thereby shewing that the principle of giving the vestry a discretion as to the amount of the pension was present to the minds of the legislature. These words, or similar ones, might have been used in s. 4, but they are left out; and I cannot attribute to the legislature an intention to give to the vestry in that section a discretion which has apparently been deliberately withheld.

WILLS, J. I am of the same opinion. I do not say that the case is perfectly clear; but the arguments on behalf of the applicant are much the more cogent. It is entirely in the discretion of the vestry whether they shall grant an allowance or not; if it is granted it must not exceed two-thirds of the salary, and regard must be had to the scale. Does this entitle the vestry to make an allowance without regard to the scale? I think not: it means that it must be in accordance with the scale, and that the scale cannot be exceeded. It has been said that *Marchant* v. *Lee Conservancy Board* (1) decides that a vestry could legally resolve to deprive a man of his pension altogether; but we have not to decide that question, and a great deal might be said in opposition to the contention, for the words of the present Act are very different from the words of the Act under which that case was decided; there the pension was to be paid out of a fund which came to the hands of trustees, and which proved insufficient for the payment of the pension; here the pension is charged on the fund out of which the salary would have been paid if the officer had not resigned; this seems as though the pension were intended to be permanent. No adequate reason has been suggested

(1) Law Rep. 9 Ex. 60.

for cutting down the plain meaning of the words "shall be as follows" in s. 4, but very good reasons have been given for the construction we put upon the section. If the conduct of an officer is such as to disentitle him to a pension at all, that is one matter, and we may assume that the vestry will act honourably in deciding such a question; but, on the other hand, the prospect of a definite pension is necessarily a very material element in determining the amount of salary. The use of the words "the annual allowance of forty-sixtieths may be granted" in the latter part of s. 4 does not restrict the previous part of the section; it only means that after a man has served forty years the vestry shall have power to grant him a pension if they think fit, but that, if granted, it shall be forty-sixtieths of his salary. And the provisions of s. 5 help our construction of the statute; for if the contention of the vestry is right there would have been no necessity to give them an express power to increase the amount of pension to which a man would be strictly entitled according to his years of service.

STEPHEN, J. I desire to add that I entirely and emphatically agree with what my brother Wills has said as to the difference between *Marchant* v. *Lee Conservancy Board* (1) and the present case.

Rule absolute.

Solicitor for prosecution: *W. T. Ricketts.*

Solicitor for defendants: *Birt.*

(1) Law Rep. 9 Ex. 60.

W. J. B.

1887
Aug. 10, 11.

[IN THE COURT OF APPEAL.]

IN RE EASY. EX PARTE HILL AND HYMANS.

Bankruptcy—Practice—Creditors' Petition—Death of Debtor before Service of Petition—Substituted Service—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 108—*Bankruptcy Rules*, 1886.

Where a debtor against whom a creditors' petition in bankruptcy has been presented dies before service of the petition upon him, there is no power under s. 108 of the Bankruptcy Act, 1883, or the Bankruptcy Rules, to dispense with service or to order substituted service of the petition, and the bankruptcy proceedings must necessarily be stayed.

APPEAL from the refusal of one of the registrars in bankruptcy to make an order dispensing with the service of a bankruptcy petition.

On April 25, 1887, the appellant Hymans recovered judgment against William Easy, but was unable to levy execution, the debtor having committed an act of bankruptcy by executing a deed of assignment of his property to a trustee for the benefit of his creditors generally. On May 25, the appellants Hill and Hymans presented a joint bankruptcy petition against Easy, which was filed on the same day. Afterwards, but before service of the petition could be effected on him, Easy died. The petitioning creditors having applied to the registrar for an order dispensing with service of the petition, or in the alternative for directions for substituted service, the registrar refused to make any order upon the application, but ordered that no further proceedings should be taken upon the petition.

The petitioning creditors appealed.

Aug. 10. *Sidney Woolf*, for the appellants. The only way in which the deed can be set aside is by allowing the bankruptcy proceedings to go on. The effect of s. 108 of the Bankruptcy Act, 1883 (1), is to throw upon those who object to the continuance of bankruptcy proceedings where the debtor has died after

(1) By s. 108 of 46 & 47 Vict. c. 52, "If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive."

1887

IN RE EASY. EX PARTE HILL AND HYMANS.

the presentation of the petition the onus of shewing that they ought not to go on; primâ facie they are to be continued "unless the Court otherwise orders." In *Ex parte Sharp, Re Walker* (1), it was held that a debtor dying after the presentation of a bankruptcy petition, but before adjudication, could be adjudicated a bankrupt under s. 108.

[LORD ESHER, M.R. In that case the debtor himself presented the petition.]

Rule 154 of the Bankruptcy Rules, 1886, provides for substituted service where the debtor is keeping out of the way, or where "from any other cause prompt personal service cannot be effected;" under this rule the Court can order service upon his personal representative.

Cur. adv. vult.

Aug. 11. LORD ESHER, M.R. There does not appear to be any power in the Court to dispense with service of the petition. The language of s. 108 is clear; where a debtor dies after the presentation of a bankruptcy petition, the proceedings are to go on as if he were alive. In the present case, if the debtor were alive, the bankruptcy proceedings could not go on without service upon him of the petition, it being a creditors' petition, unless an order for substituted service were made; this is clear from a consideration of rules 153–156, which deal with the service of creditors' petitions. It is said that there can be substituted service here, though the man is dead; but I do not see how substituted service can be ordered where the conditions are such that original personal service could not possibly be effected. The expression "substituted service" implies in itself that the original service could under certain circumstances possibly be effected; but that cannot be done in this case. I think, therefore, that where a debtor dies before service upon him of a creditors' petition, there is no power to dispense with the service or to order substituted service, and the proceedings must necessarily be stayed.

LINDLEY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitor for appellants: *H. Montagu.*

(1) 34 W. R. 550.

W. J. B.

1887
July 21.

THE QUEEN ON THE PROSECUTION OF THE GREAT WESTERN RAILWAY COMPANY *v.* THE MIDLAND RAILWAY COMPANY.

Railway Company—Arbitration—Agreement "confirmed and made binding" by, and scheduled to, Private Act—Jurisdiction of Railway Commissioners—Regulation of Railways Act (36 & 37 *Vict. c.* 48), *s.* 8—*Prohibition.*

An agreement was entered into between two railway companies, one of the clauses of which provided that all questions of difference arising out of the agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859. A private Act of Parliament was subsequently passed, in which the agreement was set out verbatim as a schedule, and it was provided by the Act that the scheduled agreement should be "confirmed and made binding" upon the parties thereto. Differences having arisen, one of the companies applied to the Railway Commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. The other company having obtained a rule nisi for a prohibition on the ground that without their consent the Railway Commissioners had no jurisdiction to entertain the application:—

Held, that the right to refer differences to arbitration was derived from the agreement itself; that the difference was not "required or authorized to be referred to arbitration under the provisions of any general or special Act" within the meaning of s. 8 of the Regulation of Railways Act, 1873, and that the Railway Commissioners had no jurisdiction to undertake the arbitration.

RULE calling upon the Midland Railway Company to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of an application by them to the Railway Commissioners against the Great Western Railway Company on the ground that the Railway Commissioners had no jurisdiction to entertain the application without the consent of the Great Western Railway Company. The facts which gave rise to the application are shortly as follows:—

On March 17, 1863, an agreement was entered into between the Midland Railway Company, of the one part, and the Great Western and West Midland Railway Companies (who for the purposes of the agreement were to be considered as one company) of the other part; and by s. 63 of the Great Western Railway (West Midland Amalgamation) Act, 1863 (26 & 27 Vict. c. cxiii.), which Act amalgamated the Great Western and West Midland Companies, the agreement of March 17, 1863, was "confirmed and made binding upon" the Midland and Great Western

Railway Companies. The agreement, which was printed at length as a schedule to the Act, made various provisions for through rates and charges, and through bookings, and for mutual interchange of traffic by the companies, and after providing for the appointment of a standing arbitrator, which provision was never carried into effect, it proceeded, by article 29, as follows: "All fares, rates and charges payable under this agreement, in case of dispute, and all questions of difference arising out of this agreement, not otherwise provided for, to be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, the arbitrators or arbitrator to have the power of determining the amount of damage which any of the companies may have sustained from any breach of this agreement."

Differences having arisen between the parties, the Midland Railway Company, on February 12, 1887, made an application to the Railway Commissioners that the questions in difference should be determined by them under the provisions of the Regulation of Railways Act, 1873, there being, by article 29 of the agreement, no arbitrator designated by name, and no standing arbitrator appointed. (1)

Sir H. Davey, Q.C., and *Balfour Browne, Q.C.* (*Meysey Thompson*, with them), for the Midland Railway Company, shewed cause. This dispute comes within the meaning of s. 8 of the Act of 1873, as being one which is authorized to be referred to arbitration

(1) By s. 8 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48): "Where any difference between railway companies . . . is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration: Provided, that the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the Commissioners are of opinion that the difference in question may more conveniently be referred to him.

By s. 9: "Any difference to which a railway company . . . is a party, may, on the application of the parties to the difference, and with the assent of the Commissioners, be referred to them for their decision."

1887

THE QUEEN v. MIDLAND RAILWAY CO.

under the provisions of a general or special Act; it is authorized to be so referred by a special Act. The agreement of March 17, 1863, derives its validity from the special Act, the effect of s. 63 of which is to give a statutory coercive force to all the provisions in the agreement. In the case of *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1), where the question was whether the jurisdiction of the Court of Session had been ousted by an arbitration clause in an agreement confirmed by an Act of Parliament, the words of the Act were:—"The said agreement shall be and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company as if those companies had been authorized by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of the Act;" and in the opinion of Lord Cairns those words did no more than give statutory validity to the enactment; but the section proceeded to say:—"It shall be lawful for the company and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained;" and these words were held to make all the provisions and stipulations in the agreement as obligatory and binding on the companies as if the provisions had been repeated in the form of statutory sections; they answer to the language of s. 63 of the Act in the present case, by which the agreement is confirmed and "made binding." The effect of the section is, therefore, not only to give statutory validity to the agreement, but to create a statutory obligation. The case of *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (2), which was a decision upon s. 8 of the Act of 1873, is very different from the present case; there the special Act merely gave the companies power from time to time to enter into agreements, and one of the agreements so entered into contained provisions for reference to arbitration; and the Court of Appeal held that the Railway Companies Arbitration Act, 1859, was not an Act which authorized or required railway companies to proceed to arbitration, but that it merely contained a code of procedure for arbitration, and that there was no difference which, under the

(1) Law Rep. 2 H. L., Sc. 347. (2) 17 Ch. D. 493.

provisions of any general or special Act, was required or authorized to be referred to arbitration. In that case the agreement to refer derived its force from the agreement between the parties, and not from the statute, which merely authorized the agreement to be made. In *Great Western Ry. Co.* v. *Halesowen Ry. Co.* (1) the provision for arbitration was contained in a contract made on behalf of a company prior to its incorporation, which was confirmed and made binding by a special Act of Parliament, to which the agreement was made a schedule; but the decision went upon the ground that the difference was not a difference within the arbitration clause, and the opinion of A. L. Smith, J., upon the question of the jurisdiction of the Railway Commissioners was unnecessary for the decision of the case.

Sir R. E. Webster, Q.C., A.G., and *Sir Henry James, Q.C.* (*R. S. Wright*, with them), for the Great Western Railway Company, in support of the rule. The parties to this agreement had full power to make it, and no Act of Parliament was necessary to give it validity; the statute is intended to give validity to agreements made by or on behalf of companies not yet in existence, but here all the three companies were already existing and competent to contract. The Act of 1863 provided for the extinction of the West Midland Company and its amalgamation with the Great Western, and s. 63 was therefore introduced in order to throw upon the amalgamated company the duty of fulfilling the obligations of the West Midland Company, and the contracts of that company were confirmed and made binding. In the case of the *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (2) there were two different sets of words, the first making the agreement binding as between the parties, the second giving to it the force of a statutory obligation as between the companies and the public; here only the first set of words is to be found in the statutory enactment. The decision in *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (3) is admittedly not a direct authority in point, as in that case the agreement containing the arbitration clause was not scheduled to an Act of Parliament, but there was power under the Act to make an agreement, which agreement

(1) 52 L. J. (Q.B.) 473; 4 Browne & Macnamara, 224.

(2) Law Rep. 2 H. L., Sc. 347.

(3) 17 Ch. D. 493.

1887

THE QUEEN v. MIDLAND RAILWAY CO.

when made contained an arbitration clause. The dicta of the Lords Justices, however, apply to the present case, and James, L.J., expressly says that s. 8 of the Railways Regulation Act, 1873, "does not extend in words, certainly not in spirit or meaning, to an agreement between companies, by which they choose between themselves to provide for a particular mode of reference." The agreement to refer being good, the companies cannot lose their right to make use of the machinery of the Arbitration Act of 1859, as provided by article 29, simply because the agreement is recognised and made binding by an Act of Parliament.

STEPHEN, J. Although this matter is not wholly free from difficulty, I think that when one or two simple distinctions are understood its decision becomes comparatively simple. In the first place we must consider the language of the Act of 1873 as compared with that of the private Act of 1863 and the schedule to that Act. The Act of 1873 declares that, where any difference between railway companies (I omit canal companies) is, under the provisions of any general or special Act, required or authorized to be referred to arbitration, that difference may be referred to the Commissioners for their decision. The question for us is, therefore, whether in the present case the difference which it is sought to refer to arbitration is one which is required or authorized to be so referred by the special Act of 1863; if so, the Midland Company is justified in insisting upon its being referred to the Railway Commissioners; if not, the Great Western Company is entitled to the prohibition which it seeks.

Now the state of affairs is this: s. 63 of the private Act says that certain heads of agreement, one of which is schedule B of the Act, are "respectively confirmed and made binding on the several companies parties thereto." And here there seems to be a distinction which, when once apprehended, throws light upon the whole question, and relieves us from the necessity of making attacks upon the language used by the draughtsman of the Act, and it is this. In considering agreements made by railway companies with each other, two things must be borne in mind, first, that such agreements frequently are, and perhaps more frequently in former times than now, were made by parties who at

the time of making them are not legally qualified to make them, and who do not possess the necessary authority to bind themselves and their successors; and from that state of things it follows that the necessity will frequently arise for parliament to sanction such agreements and to give them the force of binding contracts. The second thing to be borne in mind is that nearly all agreements between railway companies, except those which relate to mere matters of working, have another side; they affect the public convenience, and the public interest would suffer if the railway companies were allowed at will to make or to alter contracts once entered into between themselves in which the public is substantially interested. There are two matters then to be attended to in legislation on this subject; the legal validity of agreements, and the relation of the public to agreements so made, and that being so, I will examine the language of the Act of 1873.

In my opinion the effect of s. 8 is that the Railway Commissioners are entitled to accept a reference to them where the companies are required or authorized by any general or special Act to refer the differences to arbitration. What is the meaning and object of such a provision? It seems to me that its object is to enable the Railway Commissioners to have questions referred to them for their decision where the arbitration rests upon the authority of parliament, where there is some special authority of parliament which requires or authorizes it; that is to say, cases in which the railway companies could not by their own manner of constitution and according to their own independent powers, do the thing for themselves. I do not profess to have chosen the very best words for expressing my view on the subject, but that seems to me to be in general words the effect of the section; the essential part of it is that the requirement or authorization of arbitration is a distinct requirement or authorization by Parliament.

Three cases have been cited to us in argument, in which this question has arisen, and as I have formed my opinion from a consideration of them, I will say a few words upon these decisions. The first is the *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1); and when the judgment of Lord Cairns is read it seems

(1) Law Rep. 2 H. L., Sc. 347.

1887

THE QUEEN v. MIDLAND RAILWAY CO.

Stephen, J.

to me that what he has substantially decided on the question is this. The first part of the enactment in that case he holds to have done no more than give statutory validity to the agreement between the companies, that is to say, up to that point the language is such as was necessary to enable the companies to make the contract binding upon themselves, notwithstanding the difficulty they were in as to the making of a binding contract at the time when the agreement was actually entered into. But then the statute went on to say, "it shall be lawful for the company (that is the Greenock and Wemyss Bay Railway Company), and the Caledonian Railway Company, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained," and upon that Lord Cairns observes (I use my own language) that the effect of that provision is to give to the agreement the character of an Act of Parliament; there can, I think, be no doubt that that is the meaning of the language which he uses in his judgment, language so eminently applicable to the present case that I repeat it here. "It is," he says, "clear beyond the possibility of argument, that when an agreement between two companies who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections." That seems to me to be a principle which has never been controverted; it was accepted in that very case by Lord Chelmsford, Lord Hatherley, and Lord Selborne, without further observation, and we are undoubtedly bound by it. But the question here is, whether the language of s. 63, which says that the schedule B "is by this Act confirmed and made binding upon the parties thereto respectively," may be taken as equivalent to the first part only of the clause in the *Wemyss Bay Case* (1), or whether it is as extensive as the whole of the clause in that case, which, after saying that the agreement was valid and obligatory, went on to say that "the companies are hereby required to imple-

(1) Law Rep. 2 H. L., Sc. 347.

ment and fulfil all the provisions and stipulations thereof." It appears to me that the first part of the words in the *Wemyss Bay Case* (1) is substantially the same in meaning as the language used in this Act. I can see no difference at all between enacting that certain words shall be valid and obligatory and saying that the agreement is to be confirmed and made binding on the several parties; the word "confirmed" is common to both cases, but I do not understand how an agreement which is not made binding can be made obligatory; the only meaning that I can attach to the word "obligatory" when so used is that the parties to the agreement are bound by its contents; just as the meaning of a contract being binding is that its various clauses are binding upon the parties to the contract. I think, therefore, that the words in that case are practically identical in meaning with those used in s. 63 of the Act of 1863, and the first part of Lord Cairns' judgment gives complete effect to the language of that section. I can see nothing in s. 63 which has the same effect as the words to "implement and fulfil," and the result is that in my judgment s. 63, on which the present case turns, contains no words making the terms of the agreement immutable except by Act of Parliament. If they were so, the greatest expense would have to be incurred in getting bills passed whenever the simplest alteration in the agreement was wanted, even though both parties were in accord, and I am glad to be able to construe the Act so as to avoid that consequence. I do not make any observation upon the remarks of Lord Cairns as to implementing and fulfilling, as they seem to apply only to that particular case, and to have no necessary connection with the present one.

In the next case, that of the *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (2), a judgment of the late Master of the Rolls, which was much less confident in its tone than the judgments which he was wont to deliver, was overruled by the Court of Appeal, consisting of James, Brett, and Cotton, L.JJ. The judgment has been much commented on, but it seems that the case turned upon the interpretation of s. 8 of the Regulation of Railways Act, 1873, and that consideration was given to the meaning of the words "required or authorized to be referred."

(1) Law Rep. 2 H. L., Sc. 347. (2) 17 Ch. D. 493.

1887

THE QUEEN v. MIDLAND RAILWAY CO.

Stephen, J.

The view of the Court is certainly not expressed very pointedly, but it seems to be in substance that the requisition or authority is a requisition to do that which the companies were not called on to do otherwise, and an authority to do that which they were not authorized to do without the Act. If s. 63 had contained words analogous to "implement and fulfil all the provisions," that no doubt would have been a requisition, or at the very least an authority; but if the companies had power to make the agreement without any authority from parliament (and they did in point of fact so make it), then, although parliament may have thought fit to refer to it and to recite it and to schedule it, parliament does not appear to me either to have authorized it or to have taken away from the companies the power which all parties primâ facie possess of altering by common consent any contract into which they have entered. I think, therefore, that that case is a strong authority for the Great Western Company, and in favour of the view that this agreement is not one which is required or authorized by parliament to be entered into. I have this further observation to add; I think that the fact of the agreement being put into a schedule does not really affect the case; what affects the case is what parliament says about it, and I therefore agree with Lord Cairns that if an agreement is scheduled, and the Act says it is to be implemented and fulfilled, it would be just the same as if the agreement were enacted in the body of the Act; putting it into the schedule would only be a more convenient course for the draughtsman to follow. Both these cases, therefore, are in my opinion in favour of the contention of the Great Western Company.

The only remaining case is that of the *Great Western Ry. Co.* v. *Halesowen Ry. Co.* (1), as to which I will only say a few words. It was decided upon another ground, and my brother Grove refrained from expressing an opinion upon this point, while my brother Smith expressed an opinion which is admittedly strongly against the view contended for by Sir Horace Davey in the present case. I say therefore no more than that the authority of my brother Smith lends additional weight to the view which I have attempted to express. I am of opinion that our judgment should

(1) 52 L. J. (Q.B.) 473; 4 Browne & Macnamara, 224.

be in favour of the Great Western Company, and that the prohibition must go.

WILLS, J. I am of the same opinion. Broadly stated, and apart from technicality, the question is whether in a case where an agreement between two companies to which the Act of 1873 refers, containing a reference clause, has been embodied in an Act of Parliament, the necessity or the privilege, as the case may be, of having their disputes referred to arbitration has been created by the express command of the legislature, or is the offspring of agreement between the parties, the action of parliament having been confined to the removal of obstacles, actual or apprehended, to their power so to contract. In the former case it would seem upon principle to be reasonable enough for parliament to interfere, parliament being the supreme power which has provided the tribunal, and the same exercise of legislative power which provided that tribunal can alter it; that seems consistent with the usual principles of legislation in this country. If this doctrine were extended to cases where parliament has simply removed difficulties in the way of the contracting parties owing to the want of powers to do that which they have been intending to do, it would be something very like interference with private contracts already made—a kind of exercise of legislative power which, however much we may be undergoing education as to exceptional cases, it is not desirable, by judicial construction at all events, to extend. It seems to me that this is the broad line to draw. If it was substantially the action of parliament and the will of the legislature which imposed on the parties the necessity, or conferred on them the right, to go to arbitration, then parliament may change the forum, and has elected so to do. If substantially the forum was selected by the parties, and was so selected and adopted by contract between them, then the legislature does not interfere. That seems to me to be the substance of the Act of Parliament; then the only question is, under which head the form of words used in s. 63 of the Act comes. The case of *Caledonian Ry. Co.* v. *Wemyss Bay Ry. Co.* (1) is very important with reference to this question, and very shortly stated.

(1) Law Rep. 2 H. L., Sc. 347.

1887

THE QUEEN v. MIDLAND RAILWAY CO.

WILLS, J.

it seems to me to come to this; that in that case Lord Cairns thought that the specific enactments with which he was dealing were properly divisible into two classes, and that the first head of enactment was satisfied and completed by giving to the agreement which had been entered into statutory validity. But other words followed, and Lord Cairns, being of opinion that the early words had been exhausted upon giving the statutory validity which that agreement for one reason or another required, and finding words afterwards which made no reference to the mere contract between the parties, but which contained words of specific obligation without reference to their dealings, came to the conclusion that these latter words were of a different order from the first, and that the operation of the second was to place the agreement in a different category, and remove it from the mere category of an agreement inter partes into the higher category of specific law, so that by the will of parliament the agreement had ceased to be a mere agreement, and was transformed into a substantive enactment to be adhered to for the benefit of the public. That seems to me to be, shortly stated, the explanation and summary of all that it is material to observe with regard to that decision. Then, applying to the present case that decision, so understood, is there any ground whatever for dividing the simple words which have been used here into two such heads? I think not, either as regards the words themselves, or as regards the subject-matter with which they deal. The words are that the agreement shall be confirmed and made binding between the parties. If an agreement is confirmed, it is made binding between the parties. I do not think one can reject the expression "between the parties"; the whole of that expression must be taken together. It merely means that that agreement is to be confirmed, and is to be a valid agreement, as it professes to be, between the parties. If one looks at the subject-matter of the agreement, one sees very well why it should have been necessary to resort to parliament for a simple confirmation, and why it is not necessary to extend these words beyond. There were undoubtedly to my mind certain purposes in that agreement which required the sanction of parliament. It is not necessary I think to refer, for the purpose of illustration, to anything else than

article 8, under which one of the railway companies proposed to do something with regard to Worcester Station which it had not then power to do, although there was at the time a bill in parliament which it was hoped would give it the necessary power. That obviously was an agreement which could not be carried out without the sanction of parliament either by confirming this agreement or by passing another Act of Parliament. Therefore it was necessary, in order to make it a workable agreement between the parties, to give statutory confirmation to it. There are many parts of it, which have been pointed out in the course of the argument, as to which, if it were possible to read it otherwise, it would be unreasonable in the highest degree to suppose that parliament stamped the character of absolute and unchangeable perpetuity upon it, because they relate to matters affecting merely the convenience of the two companies, in which the public have no interest whatever; it would be highly unreasonable to suppose that the companies were bound to such arrangements for ever, and that parliament took away from them the power which they otherwise would have had of altering the agreement in those respects.

The next case is *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (1) It seems to me that the subject-matter of that decision was so far away from anything which arises in this case that it cannot be regarded as an authority. One can understand how anything can be contended, but I cannot understand how it could ever be hoped to be successfully contended that, where an agreement had been made simply under a power of an Act of Parliament which enabled it to be made in future, such an agreement could by any reasonable construction be brought within the words of this Act of Parliament, or that the reference clause contained in it could be treated as having been required or authorized to be entered into by an Act of Parliament. And therefore that decision, as it seems to me, does not touch the present case, though undoubtedly some of the expressions used by the Lords Justices are very strong indeed in favour of the view which has been presented to us to-day on behalf of the Great Western Railway Company. It seems to me, therefore,

(1) 17 Ch. D. 493.

1887

THE QUEEN v. MIDLAND RAILWAY CO.

WILLS, J.

that that case presents no difficulty in the way of the decision that we are giving, and that the views which we have expressed are fortified by much that was said by the learned Lords Justices in that case.

There remains the case of the *Halesowen Company* (1), as to which all that I have to observe is that one of the learned judges, Grove, J., having given no decision upon the point in question, and having apparently been rather disposed to differ from A. L. Smith, J., and the matter now under consideration not having been necessary to the decision of that case, it cannot be treated as an authority binding upon us; but at the same time I must say that after consideration I have come to the same conclusion that my learned brother A. L. Smith came to. It seems to me that much of what I have wished to say is excellently expressed in the short judgment which he pronounced upon that subject, and I should wish to express my concurrence in every word which fell from his lips in reference to this particular point. I have therefore come to the conclusion that the words of the Act of Parliament ought to receive this construction apart from authority, and that there is strong authority beside the mere words of the Act of Parliament in favour of the view which we have expressed, and I agree that this rule must be made absolute with costs.

Rule absolute.

Solicitor for prosecution: *R. R. Nelson.*

Solicitors for defendants: *Beale, Marigold & Co.*

(1) 52 L. J. (Q B.) 473; 4 Browne & Macnamara, 224.

W. J. B.

BETHELL & CO. *v.* CLARK & CO.

1887
June 14;
Aug. 10.

Sale of Goods—Stoppage in Transitu—Goods bought for Shipment abroad—Delivery of Goods on board Ship—Termination of Transit.

T., in London, bought goods of C., in Wolverhampton, and sent to C. a consignment note in the following terms:—"Please consign the ten hogsheads hollow ware to the *Darling Downs*, to Melbourne, loading in the East India Docks here." The goods were forwarded by railway to Poplar for shipment, and were shipped on the *Darling Downs* for Melbourne at noon on July 3. About 10 o'clock on the same morning C., at Wolverhampton, having heard of T.'s insolvency, sent a written authority to the railway company to stop delivery of the goods, and the railway company at once telegraphed to their agent at Poplar to that effect, but the message did not arrive in time to prevent the shipment of the goods on board the *Darling Downs*. The mate's receipt for the goods was given to the railway company and by them forwarded to T., but no bills of lading in exchange for the receipt were ever applied for by any of the parties. The *Darling Downs* sailed for Melbourne with the goods on board. On July 11 T. presented a bankruptcy petition, and a scheme of arrangement was ultimately approved of by the creditors. The trustee under the scheme having claimed the goods:—

Held, that there was no constructive delivery of the goods to the buyers; and that therefore the transit was not at an end and the notice to stop was good.

SPECIAL CASE stated under Order LVII., r. 9.

1. On June 2, 1885, Messrs. J. & C. Clark & Co., ironfounders of Wolverhampton, received from Messrs. W. W. Tickle & Co., of London, an order for ten hogsheads of hollow ware. The material part of the order is as follows:—

"Please pack the under mentioned goods for us in usual way, and mark same as before, following numbers invoice in duplicate. On receipt of invoice we will forward you shipping documents.

"10 hhds. hollow ware, usual assortment."

2. On June 25, 1885, in pursuance of the said order, Clark & Co. forwarded to Tickle & Co. an invoice of goods amounting to 99*l.* 6*s.* 8*d.*

3. On June 28, 1885, Clark & Co. received from Tickle & Co. a consignment note in the following terms:—

"Please consign the 10 hhds. h'ware to the *Darling Downs*, to Melbourne, loading in the East India Docks here. To come up at once."

4. On June 29, 1885, Clark & Co. delivered the ten hogsheads

1887

BETHELL v. CLARK.

of hollow ware to the carriers, Messrs. Pickford & Co., collecting agents for the London and North Western Railway Company at Wolverhampton, together with a consignment note, the contents of which are not material.

5. On June 30, 1885, the London and North Western Railway Company sent to Tickle & Co. an advice note, of which the following are the material parts:—

"The under mentioned goods consigned to you on the conditions shewn on the back hereof having arrived at this station, I will thank you to instruct our agents, Messrs. Pickford & Co., as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company not as common carriers but as warehousemen at owner's sole risk, and subject to the usual warehouse or wharfage charges in addition to the charges now advised.

"The goods advised by this note have been forwarded to our Poplar Station for shipment per *Darling Downs*, E. I. Dks."

6. On or before July 2, 1885, the ten hogsheads arrived at Poplar, and on July 2 were put on board the lighter *Nile* at Poplar by the London and North Western Railway Company to be towed alongside the *Darling Downs* by the Thames Steam Tug and Lighterage Company, Limited, the agents of the London and North Western Railway Company. On the morning of July 3 the ten hogsheads were towed alongside the *Darling Downs*, and at noon of that day they were shipped on board the *Darling Downs*. Thereupon the mate's receipt for the ten hogsheads was given to the London and North Western Railway Company, who at once forwarded it to Tickle & Co.

7. On July 3, 1885, Clark & Co. received a letter dated July 2 from the solicitors for Tickle & Co.'s creditors, announcing the insolvency of Messrs. Tickle & Co.

8. Upon the receipt of such letter about 10 A.M. of July 3, Clark & Co. sent by messenger to the agent at Wolverhampton Western Railway Company a letter, of which the following are the material parts:—

"Dear Sir,—10 hhds. consigned June 29th /85 to the *Darling Downs*, @ Melbourne, loading in the East India Docks, to W. W. Tickle & Co., 20 St. Helen's Place, London, E.C.. Please

do your utmost to stop delivery of these hhds. Of great importance that delivery should not be effected. Will you kindly wire at once and let us have a reply quick where they are. The consignment to be transferred for our order. We depend upon your special attention."

At the time this letter was received by the agent at Wolverhampton of the London and North Western Railway the ten hogsheads were on board the lighter *Nile* in charge of the Thames Steam Tug and Lighterage Company, Limited, as agents of the railway company.

9. Immediately upon the receipt of the letter the agent at Wolverhampton of the London and North Western Railway Company sent to the agent of that company at Poplar the following telegram:—

"Senders ask us to stop delivery; hold goods; do not advise consignee; can I accept indemnity? Wire how matter stands."

And immediately upon the receipt of this telegram the agent at Poplar of the London and North Western Railway Company sent orders to the Thames Steam Tug and Lighterage Company, Limited, not to ship the ten hogsheads, but that company did not receive these orders in time to prevent the shipment of the goods on board the *Darling Downs*.

10. At or shortly after the time when the mate's receipt for the ten hogsheads was made out as stated in paragraph 6, bills of lading in accordance therewith were prepared for the same and signed ready for delivery, but were not applied for at the time, and they have since remained, and now are, in the possession of Messrs. C. Bethell & Co., the owners, or the agents of the owners, of the *Darling Downs*, who are also the stakeholders in these proceedings.

11. Shortly after the shipment of the ten hogsheads the *Darling Downs* sailed from London to Melbourne with the ten hogsheads on board.

12. On July 11, 1885, Tickle & Co. presented a petition in bankruptcy, and on the same day a receiving order was made.

13. On August 7, 1885, a scheme of arrangement of the affairs of Tickle & Co. was submitted to their creditors, and the same was on August 26, 1885, duly confirmed by a resolution passed

1887

BETHELL v. CLARK.

by a majority of creditors representing three-fourths in value of all the creditors who had theretofore duly proved their debts.

14. On August 8, Clark & Co., who had not been paid the price of the ten hogsheads, wrote to Bethell & Co. claiming as their property the ten hogsheads.

15 and 16. On August 15, 1885, Mr. John Young was appointed special manager of the estate and business of Tickle & Co., and on September 15 the scheme of arrangement and the appointment of Mr. John Young as trustee to administer the said debtors' property and manage their business were duly approved by the Court.

18. On September 21, Clark & Co. paid to Bethell & Co. the freight upon the said hogsheads to Melbourne, but the same was received by Bethell & Co. without prejudice to the question as to who was entitled to the ten hogsheads.

19. On October 15, 1885, the *Darling Downs* arrived at Melbourne with the ten hogsheads on board, and at the time of the commencement of these proceedings they were in the custody of Gibbs, Bright & Co., shipping agents and consignees at Melbourne of the *Darling Downs*.

20. On November 9, Bethell & Co. received a letter from Mr. John Young (as such trustee as aforesaid) claiming the bills of lading relating to the said hogsheads.

The question submitted for the opinion of the Court was whether under the circumstances Mr. John Young or Messrs. T. and C. Clark & Co. were entitled to the possession of or property in the said hogsheads.

June 14. *Charles, Q.C.* (*G. E. Lyon*, with him), for the trustee. The question is, as was pointed out by the Court of Appeal in *Ex parte Miles* (1), what was the transitus in point of fact. Here the transitus was at an end as soon as the goods were on board the *Darling Downs;* their ultimate destination depended upon information which had still to be given by the vendees. This case is undistinguishable from *Kendal* v. *Marshall Stevens* (2), in which it was held that where goods are sent through a carrier to a fowarding agent appointed by, and receiving his orders from, the

(1) 15 Q. B. D. 39. (2) 11 Q. B. D. 356.

vendee, the transitus is at an end upon the goods reaching the hands of the forwarding agent, and the right to stop is gone, although the intention may be to send the goods to an ulterior and subsequent destination.

Underhill, Q.C. (*C. M. Plumptre*, with him), for the vendors. The destination of the goods was Melbourne, and the stoppage was good. The effect of the cases is that where something has to be done to keep the goods moving on to the place of their final destination, the transitus is at an end when they come into the hands of agents of the buyer who so far represent their principal as to make a delivery to them a delivery to their principal, and who do not act as mere carriers on his account. Delivery to the carrier is only constructive, and not actual, delivery to the purchaser; and the goods being in possession of the master of the ship only as carrier, and not as the purchasers' agent to take delivery, the notice to stop was in time: *Ex parte Rosevear China Clay Co.* (1)

[He also cited *Ex parte Watson, In re Love* (2); *Ex parte Golding Davis.* (3)]

Charles, Q.C., in reply. *Ex parte Watson* (2) is not in point; it was part of the original bargain between the vendor and purchaser in that case that the purchaser should ship the goods to Shanghai; that place was therefore by agreement the destination of the goods, and the transitus was not at an end until they arrived there. In *Ex parte Rosevear China Clay Co.* (1) the delivery to the ship was not a delivery to the master as the purchaser's agent, but only to him as carrier.

Cur. adv. vult.

Aug. 10. MATHEW, J. This is a special case stated to ascertain whether Mr. Young, as trustee of the estate of Tickle & Co., or Messrs. Clark are entitled to the possession of ten hogsheads of hollow ware which had been forwarded on board the *Darling Downs* from London to Melbourne. On June 1, 1885, Clark & Co. received an order at Wolverhampton from Tickle & Co. for the goods in question, and on June 25, in pursuance of the order,

(1) 11 Ch. D. 560. (2) 5 Ch. D. 35.
(3) 13 Ch. D. 628.

1887

BETHELL v. CLARK.

Mathew, J.

an invoice for the goods, amounting to 99*l.* 6*s.* 8*d.*, was forwarded by Messrs. Clark to Messrs. Tickle. In the order nothing was stated as to the destination of the goods; but on June 28, Clark & Co. received from Tickle & Co. directions to consign the goods to the *Darling Downs*, then loading in the East India Docks for Melbourne. On June 29 the goods were accordingly delivered by Clark & Co. to the London and North Western Railway Company at Wolverhampton, to be put on board the *Darling Downs*. On June 30 the London and North Western Railway Company notified to Tickle & Co. that the goods had been forwarded to Poplar Station for shipment, and on the morning of July 3 the goods were shipped by lightermen employed by the railway company, and put on board the *Darling Downs*. The mate's receipt was sent to Tickle & Co. While the goods were in course of transit to the *Darling Downs*, Clark & Co. were informed that the buyers had stopped payment, and they immediately tried to stop the delivery of the goods; but before the notice to stop was received the goods had been shipped. The vessel shortly afterwards sailed from the docks for Melbourne with the goods on board. No bills of lading were applied for in exchange for the mate's receipt, and it was arranged that the goods should remain in possession of the owners of the ship pending the settlement of the question whether or not the right to stop in transitu was gone.

It was contended for the trustee of the buyers' estate that the rule of law applicable to the case was this: that where goods have arrived at a place indicated by the buyer to the seller, and are to remain there in the hands of an agent of the buyer, there is an end of the transitus, although the place be not that of their ultimate destination. In the particular case it was said that the master or mate of the vessel was the agent of the buyers, who, as between them and the sellers, was to receive the goods for the buyers, and therefore that this transit ended with the shipment.

But the principle to be gathered from the many decisions on the subject seems to me to be, that in determining whether there has been a constructive delivery of the goods to an agent of the buyer it must be ascertained in what capacity the agent has received the goods, whether to carry or to hold for the buyer. In other words the inquiry must be, what is the exact nature of

the contract between the buyer and the agent under which the latter has received the goods. In *Dixon* v. *Baldwen* (1) the evidence was directed to shew that Metcalf received the goods as agent for the buyers, in order that he might hold them until he received further orders as to their destination, and that without such orders the goods in his hands would remain stationary. The Court held upon this evidence that when the goods reached Metcalf the transit was at an end.

In *Kendal* v. *Marshall* (2) the facts as presented to the Court of Appeal would seem to be different from those dealt with by the Court below. At the trial it appeared that Marshall & Co. had entered into a contract with the buyers to forward the goods at through rate from Bolton to Rouen. It was not suggested that there was any contract between the buyers and Marshall & Co. other than the contract to forward. There was no evidence that the railway company were the agents of the buyers. They were treated as having acted for Marshall & Co. In the Court of Appeal it would appear from the judgment of all the Lords Justices that it was assumed or admitted that the railway company were the agents of the buyers to carry the goods to Garston and there deliver them to Marshall & Co. to be held by them for the buyers until further orders were given. With this material alteration of the evidence submitted to the Court of Appeal the case was readily brought into line with *Dixon* v. *Baldwen* (1), and it was held that there had been a constructive delivery to the buyers. The judgments delivered in the Court of Appeal in this and in the later case of *Ex parte Miles* (3) seem to me to involve the application of the principle that in determining whether the goods are still in transitu a sufficient inquiry into the facts must be made to ascertain what has been the contract between the buyers and the agent who has received the goods.

The cases referred to are instances of constructive delivery to the buyer and of consequent termination of the transit. But the numerous cases, from *Smith* v. *Goss* (4) to *Ex parte Watson* (5), in which the receipt of the goods by the agent has been held not to

(1) 5 East, 175.
(2) 11 Q. B. D. 356.
(3) 15 Q. B. D. 39.
(4) 1 Camp. 282.
(5) 5 Ch. D. 35.

1887

BETHELL v. CLARK.

Mathew, J.

be a constructive delivery to the buyer indicate, it seems to me, with equal clearness the existence and application of the rule. These authorities shew that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit.

The case of *Ex parte Rosevear China Clay Co.* (1) presents a close analogy to this case. The buyer had purchased china clay which was to be delivered by the seller free on board at a specified port. Afterwards the buyer named the vessel to the vendor and the clay was shipped. Before the ship sailed the buyers stopped payment, and notice to stop in transitu was given to the master. No bill of lading had been signed. It was decided by the Court of Appeal that the transit was not at an end.

In the present case it seems clear that the London and North Western Railway Company, the lightermen, and the shipowners were all agents of the buyers, not to hold but to forward the goods. The reason urged by the learned counsel for the trustee that the delivery on board the ship to the mate was a constructive delivery to the buyers would apply as forcibly to the delivery to the London and North Western Railway Company. But if this were a delivery to the buyer the transit would have ended in law at the point where it commenced in fact. The contract with the shipowner was to forward the goods to Melbourne, and there deliver upon the terms of a bill of lading in the usual form, and until the bill of lading had been transferred to a bonâ fide holder for value it seems to me that the sellers in this case would retain the right to stop in transitu.

It was further urged for the trustee that the transit was over when the goods were shipped, because the goods might, on the demand of the buyers, have been taken out of the possession of the master of the ship; but this possibility, so remote in a business point of view, is no proof that the transit was terminated (see *London and North-Western Ry. Co.* v. *Bartlett.* (2)) The further point was made that the notice to stop was insufficient, because it had been served on the owners and not on the master of the ship. But the notice had been given to the owners under

(1) 11 Ch. D. 560. (2) 7 H. & N. 400.

such circumstances as enabled them to communicate with the master, and prevent a delivery contrary to the terms of the notice to stop: *Whitehead* v. *Anderson*. (1)

I am of opinion for these reasons that the sellers were entitled to stop the goods, and our judgment is for them with costs.

CAVE, J. In all cases of stoppage in transitu it is necessary first of all to ascertain what is the transitus or passage of the goods from the possession of the vendor to that of the purchaser. The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser the transitus begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transitus is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the transitus is at an end, when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles.

In the case now before us the purchasers directed the vendors, who carried on business at Wolverhampton, to send the goods to the *Darling Downs*, then loading in the East India Docks for Melbourne, and the vendors accordingly delivered the goods to the London and North-Western Railway Company at Wolverhampton to be taken to and put on board the *Darling Downs*. The railway company carried the goods to their Poplar Station, and then by means of lightermen put them on board the *Darling Downs*. The lightermen took from the mate and gave to the railway company receipts for the goods, which the railway company sent to the purchasers. Nothing more was done, and the *Darling Downs*, having the goods on board, sailed in due course for Melbourne. The vendors during the voyage gave the shipowners notice to stop delivery of the goods; and it was arranged

(1) 9 M. & W. 518.

1887

BETHELL v. CLARK.

Cave, J.

that on their arrival at Melbourne they should remain in the custody of the shipowners pending the decision of the question whether the right to stop in transitu was gone when the goods were put on board the *Darling Downs*. Now, if the purchasers, on getting the mate's receipts, had sent a clerk with them to the *Darling Downs* to exchange them for a bill of lading of the goods, I should have been of opinion that the goods had come into the possession of the purchasers, and that the transitus was at an end; because I should from these facts have drawn the inference that it was the intention of the vendors and purchasers that, as between them, the *Darling Downs* in the East India Dock should be the destination of the goods. For I think it is quite immaterial whether the purchasers do or do not intend, after the goods have got into their possession, to send them to a further destination, and that it is equally immaterial whether they do or do not communicate such intention to the vendors. On the other hand, if the London and North-Western Railway Company had exchanged the mate's receipt for a bill of lading making the goods deliverable to the order of the vendors, and had sent that bill of lading to the vendors, and if the purchasers had acquiesced in that course of conduct, I should have drawn the inference that, as between the vendors and the purchasers, Melbourne was the destination of the goods. In this case neither of these courses was exactly followed. The railway company sent the mate's receipts to the purchasers, who did nothing with them. No bill of lading was obtained by any one; and the goods went to Melbourne, because, by the direction of the purchasers, the vendors had put them on board a vessel bound for that place. Under these circumstances I am unable to distinguish this case from that of *Ex parte Rosevear China Clay Co.* (1), which is binding upon us, although I am also unable to reconcile that case with some of the dicta in *Ex parte Miles.* (2) I agree, therefore, that judgment must be entered for the defendants.

Judgment for defendants.

Solicitor for defendants: *G. R. Hubbard.*

Solicitor for trustee of vendees: *W. Beck.*

(1) 11 Ch. D. 560.

(2) 15 Q. B. D. 39.

W. J. B.

THOMAS *v.* MIREHOUSE. (1)

1887
July 27.

*Landlord and Tenant—Sheriff—Claim for Arrears of Rent—Liability of Sheriff to Landlord for Removal of Goods under Execution after Notice of Claim for Arrears of Rent—Forced Sale—Measure of Damages—*8 *Anne*, *c.* 14, *s.* 1.

In an action under 8 Anne c. 14, s. 1, against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is primâ facie the amount of rent due, but it is competent to the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due.

APPEAL from the County Court of Pembroke. The action was brought by the plaintiff against the defendant, the sheriff of the county of Pembroke, to recover under stat. 8 Anne, c. 14, s. 1 (2), 30*l.*, being one year's rent of a house at Hill Street, Issels, Pembroke, alleged to have been due to the plaintiff from his tenant at the time when an execution was levied upon such tenant's goods by the officer of the defendant under a fi. fa. sued out in an action in which the tenant was defendant.

It appeared that at the time of the execution J. W. Thomas held the premises as tenant to the plaintiff from year to year at a yearly rent of 30*l.*, and that at such time he was indebted to the plaintiff in 30*l.* in respect of arrears of rent due. It also appeared that notice of his claim for rent had been given by the

(1) Before Lord Esher, M.R., Lindley and Lopes, L.JJ., sitting as a Divisional Court.

(2) 8 Anne c. 14, s. 1: "No goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as shall be due for rent for the the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act: and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money."

1887

THOMAS v. MIREHOUSE.

plaintiff to the defendant before the removal of the goods, and that the goods were removed and sold without payment of the rent under an indemnity given to the defendant by the execution creditor.

For the defendant it was proved that the amount for which the goods taken under the execution were sold was 21*l.* 17*s.* 3*d.* From this sum the defendant claimed to deduct 6*l.* 4*s.* 6*d.* for levy fee, possession money, mileage, and the expenses of the sale, and contended that he was not liable to the plaintiff beyond the amount of the balance, viz. 15*l.* 12*s.* 9*d.*

The judge found a verdict for the plaintiff and assessed the damages at 30*l.*

T. Terrell, for the defendant. If the sum at which the damages are assessed represents the amount of the arrears of rent due, this is not the measure of damages. Apart from the decisions on the statute it might well be questioned whether its terms give the landlord any remedy against the sheriff. It has, however, been held to give the landlord the double remedy of an action on the case and an application by motion to the Court for relief: *Palgrave* v. *Windham* (1); *West* v. *Hedges*. (2) In the latter case, the sheriff having in hand as the proceeds of the sale a sum exceeding the rent, was ordered to pay over the full amount claimed. But in *Henchett* v. *Kimpson* (3), in which the sale produced less than the rent, the sheriff was held liable to the landlord only in the proceeds of the sale, after deducting his lawful charges. In *Green* v. *Austin* (4) the proceeds in the hands of the sheriff exceeded the rent, and the landlord suing for the rent as money had and received to his use, was nonsuited. On the other hand, in *Foster* v. *Hilton* (5) the Court refused to allow a sheriff to bring into Court the sum realized less his expenses as an answer to an action. In *Calvert* v. *Joliffe* (6) the same course was taken, Parke, J., saying "The landlord is entitled to recover such damages as accrued to him by the wrongful act of the sheriff. The amount of such damage is for the jury; they may possibly

(1) 1 Str. 212.
(2) 1 Barnes, Notes of Cases, 211. See also note to *Smallman* v. *Pollard*, 6 M. & G. 1001, at p. 1004.
(3) 2 Wils. 140.
(4) 3 Camp. 260.
(5) 1 Dowl. 35.
(6) 2 B. & Adol. 418.

think they are not even bound to give the sum for which the goods were actually sold." In *Riseley* v. *Ryle* (1), Parke, B. said: "The provision of the statute is that the sheriff shall not take the goods unless the landlord's rent be paid before their removal, i.e., shall not remove them unless the rent be first paid. That may well be translated as directing that the sheriff shall pay the rent to the landlord before the removal of the goods, or else shall be liable in damages." See also per Patteson, J., in *Wharton* v. *Naylor*. (2)

The object of the statute is to compensate the landlord for the loss of his power of distress. This loss is properly measured, and irrespective of the amount of the rent due, by the value of the goods seized, which, if the sale has been conducted with reasonable care, and here there is no evidence to the contrary, will be the sum for which they sold. In the case of a large house the rent may indefinitely exceed the amount levied for under an execution.

Wilfrid Allen, for the plaintiff. The measure of damages is the sum due in respect of arrears of rent. The object of the statute is to secure to the landlord payment of the rent before the execution creditor derives any benefit under the execution. In *Arnitt* v. *Garnett* (3) a sheriff who had paid over to the execution creditor a sum exceeding the rent after notice of the claim of the landlord was ordered to pay to the landlord the amount of rent due. In *Colyer* v. *Speer* (4) the Court held that it was no defence to prove that after the execution a distress sufficient to pay the rent remained on the premises. In *Cocker* v. *Musgrove* (5), Lord Denman, C.J., said, "the sheriff is not called upon by law to advance money to pay the rent: it is plain that such advance must be made by the execution creditor; and, if he neglects to make it, after notice of the rent being due at all events, the sheriff cannot be called upon to sell the goods, let their value be what it will. Until the rent be paid, there are no goods out of which the sheriff is bound to levy, that is, which he is bound to sell." These authorities shew that if the sheriff sells without

(1) 11 M. & W. 16.
(2) 12 Q. B. 673.
(3) 3 B. & Ald. 440.
(4) 2 Brod. & B. 67.
(5) 9 Q. B. 223.

1887

THOMAS v. MIREHOUSE.

procuring the execution creditor to pay or himself paying the rent, he can be compelled to pay its amount to the landlord as damages for a wrongful act under the statute.

LORD ESHER, M.R. The law appears to stand thus. When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid. Even if there are goods upon the demised premises of a value many times exceeding the amount of rent due his duty is the same. He must refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. Now, of course, the sheriff is not bound to find money with which to satisfy the claim of the landlord. He must, therefore, before he proceeds with the execution, apply to the execution creditor for the sum which is necessary. If the execution creditor provides it, the sheriff pays the landlord and proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute, and may either return "nulla bona" and withdraw from possession, or may himself pay the rent, looking to the execution creditor for reimbursement, and proceed to sell. This is the position of the sheriff under the Act. If he commits a breach of duty by a wrongful sale, i.e., a sale which takes place before the rent is paid, the statute appears to me to state by implication that he will be liable to compensate the landlord by paying him the amount of rent which is due. This is the consequence of the enactment which makes the removal without payment of rent illegal. It is only upon payment of the rent that the sheriff is entitled to remove the goods. The cases, however, shew that though the amount of the rent is primâ facie the measure of the damages, it is open to the sheriff, after the landlord has proved his case by giving evidence of the tenancy, the amount of rent due, and notice, to shew in mitigation of damages that the value of the goods removed was not sufficient to pay the rent. In such case, the loss to the landlord by the removal of the goods, or, in other words, their value to him at the time of the removal, becomes the measure of damages.

Here the defendant has failed to shew that the value of the

goods to the landlord at the time of the removal was less than the rent. He has merely shewn that they produced less on a forced sale. But it does not follow that this sum represents their value to the landlord. This could only be so if he were bound to distrain, which he is not, and also to distrain at the same time and under the same circumstances and employing the same auctioneer as the sheriff when the wrongful sale took place. The appeal will therefore be dismissed.

LINDLEY, L.J. I am of the same opinion. I agree with the Master of the Rolls in his interpretation of the statute. All that the landlord has to prove in order to entitle himself to the amount of the rent as damages is that the rent is in arrear, that the sheriff has had notice of this, and that he has notwithstanding removed the goods. It then lies on the sheriff to shew that the value of the goods removed was less than the rent and so to reduce his liability. Here he has offered no evidence in mitigation of damages.

LOPES, L.J. There appears to be no clear authority on this point though it must frequently have arisen. I think the measure of damages is primâ facie a year's rent, but that the sheriff may reduce them to the real value of the goods. If the judge gave the sum assessed as the rent he was wrong, but he may well have thought that though they produced the smaller sum at a forced sale they were worth the larger to the landlord. The appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *H. J. Allen.*

Solicitors for defendant: *Speechly, Mumford, & Landon, for Roderick, Llanelly.*

H. D. W.

1887

Aug. 8.

JENKINSON *v.* BRANDLEY MINING COMPANY.
JENKS, CLAIMANT.

Company—Debenture—Interpleader—"Covering" Deed—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

Debentures were issued by a limited company in the form of bonds by which the company covenanted to pay to bearer the principal and interest, each debenture containing a clause that the repayment was secured by an indenture of mortgage made between the company and certain persons as trustees for the debenture holders. The mortgage deed was not identified in the debentures by its date or by any further particulars of its contents; and the debentures themselves did not affect to pass any of the company's property to the holder. The deed itself, which was of even date with the debentures, was an ordinary deed of mortgage, purporting to convey all the land, plant, machinery, fixtures, &c., of the company to the mortgagees; it contained no trust for the benefit of the debenture holders. It was not registered as a bill of sale.

Goods and chattels of the company having been seized in execution under a judgment obtained by the plaintiff, a claim was made to them by a holder of the debentures:—

Held, that, the mortgage deed being void for want of registration under the Bills of Sale Acts, the debentures created no charge enforceable by the holder against a bonâ fide execution creditor.

Ross v. *Army and Navy Hotel Co.* (34 Ch. D. 43) distinguished.

INTERPLEADER SUMMONS referred to the Court by the judge at chambers at the request of the parties.

The plaintiff recovered judgment against the defendants upon a claim for goods sold, and the claimant claimed the goods and chattels of the defendants as the holder of debentures issued by them. In 1884 the defendant company issued debentures to the amount of 2000*l.*, in bonds of 100*l.* each, payable to bearer on November 1, 1888, which debentures professed to be secured by a mortgage deed of even date with the debentures. The mortgage deed, which was made between the Brandley Mining Company of the one part, and William Jenks and Thomas Holden, the mortgagees, of the other part, was in form an ordinary mortgage of all the land, plant, machinery, fixtures, &c., of the company, and recited an agreement for the sale of mining rights to the company and a stipulation that 2000*l.*, part of the purchase-money, should be payable in debentures which should form a charge upon the property described in the schedule thereto; the deed contained

no trust for the benefit of the debenture-holders, and it was never registered as a bill of sale. The debentures, which did not assume to pass the property of the company, were in the form of a covenant by the company to pay to the bearer the principal sum secured by them upon November 1, 1888, and to pay the interest upon presentation of the coupons; each debenture contained a clause that its repayment was secured by an indenture of mortgage between the company of the one part, and Holden and Jenks, as trustees for the debenture holders, of the other part, and by a declaration of trust by the mortgagees; but the mortgage was not identified in the debentures by its date, or by any particulars other than the names of the parties thereto.

The claim to the goods seized under the execution was originally made by the mortgagees under the mortgage deed; but it being admitted that their claim was bad, as the mortgage required registration as a bill of sale, it was withdrawn and a fresh claim made by Henry Jenks, as holder of the entire issue of debentures.

D'Eyncourt, (*Wedderburn*, with him), for the plaintiff. The mortgage deed is void for want of registration as a bill of sale: *Brocklehurst* v. *Railway Printing and Publishing Co.*, decided by Field, J., at chambers (1); *Ross* v. *Army and Navy Hotel Co.* (2) The debenture is a mere bond for the payment of money; it contains no words passing the property of the company, and although it refers to a covering indenture, that indenture is not identified in the bond. The case of *Ross* v. *Army and Navy Hotel Co.* (2), in which debentures were held to confer a good equitable charge, although the "covering" deed was void, is distinguishable on two grounds: first, the debenture in that case on the face of it assumed to pass the property; and, secondly, the question at issue was between the grantors and the grantees of the debentures; it is therefore no authority as to the rights of the holders of such debentures against third parties who are bonâ fide execution creditors of the company.

T. Willes Chitty, for the claimants. But for the provisions of the Bills of Sale Act, 1882, the mortgage deed would have passed

(1) W. N. 1884, p. 70.

(2) 34 Ch. D. 43.

1887

JENKINSON v. BRANDLEY MINING COMPANY.

the property to the mortgagees, and could have been impeached only on the ground of fraud. Although it is void for want of registration as a bill of sale the debentures themselves are not void, being expressly excepted from the necessity for registration by s. 17 of the Act. (1) They create a good equitable charge, and effect will be given by the Court upon interpleader proceedings to equitable claims: *Duncan* v. *Cashin* (2); *Engelback* v. *Nixon* (3); *Rusden* v. *Pope* (4); Judicature Act, 1873, s. 24, sub-s. 4. The case of *Ross* v. *Army and Navy Hotel Co.* (5) is in point as shewing that these debentures create a good charge; the only distinction between that case and the present is that there the debenture itself shewed what property had been assigned by the mortgage deed, while in the present case it does not; but the omission can be supplied by parol evidence. Creditors of the company are sufficiently protected by the provisions of s. 43 of the Companies Act, 1862, which requires the company to keep a register of mortgages and charges which shall be open to inspection by creditors and members at all reasonable times.

GROVE, J. In this case execution has been issued against the goods of a company by a bonâ fide creditor, and the claim set up in opposition is by a holder of a considerable number of the company's debentures. On reading the debenture it at once becomes apparent that, although it affects to be issued under the provisions of a mortgage deed by which the property of the company was conveyed to trustees for the purpose of securing the debenture holders, there is not upon the debenture itself any date or particulars of the trust deed. I am clearly of opinion that the claimant cannot oust the execution creditor, and that he has no such right to the property as would entitle him to succeed in an interpleader proceeding; he is a mere creditor of the company, and cannot better his position by relying on a mortgage deed which is not identified in the debenture, which is his security.

(1) By s. 17 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43): "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock, or goods, chattels, and effects of such company."

(2) Law Rep. 10 C. P. 554.

(3) Law Rep. 10 C. P. 645.

(4) Law Rep. 3 Ex. 269.

(5) 34 Ch. D. 43.

The original claim of the mortgagee was abandoned, because the mortgage required registration as a bill of sale, and it is now argued, I think erroneously, that the debenture holders have a right to the benefit of the mortgage. The argument for the debenture holders is founded on the decision in *Ross* v. *Army and Navy Hotel Co.* (1), which was to the effect that a debenture holder, though neither his debenture nor the covering-deed was registered, came within the saving clause contained in s. 17 of the Bills of Sale Act, 1882. The exception in that clause is not an exception in favour of debentures generally, but of debentures "issued by any mortgage, loan, or other incorporated company," which according to the ordinary rule of interpretation would mean any incorporated company ejusdem generis with mortgage and loan companies. But the question in that case was merely one between the debenture holders and the company itself, and the case only decides that the debentures constituted a valid charge against the company, and that there was no necessity for registration as between the immediate parties to the debentures; it is no authority whatever against a bonâ fide creditor for value who has issued execution against the company; if it were, a company would be enabled to entirely evade all the wholesome requirements of the Bills of Sale Acts, and if they wished to obtain goods and avoid paying for them they would only have to issue debentures to any one they pleased and get the holders to set up their claims against those of the genuine creditors. Such a state of things would be a manifest injustice.

HUDDLESTON, B., concurred.

Solicitors for plaintiff: *Nicol, Son, & Jones, for Isaac Lowthian, Keswick.*

Solicitors for claimants: *Pritchard, Englefield & Co., for Brabner & Court, Liverpool.*

(1) 34 Ch. D. 43.

W. J. B.

1887
July 5.

In re BRÜNNER.

Bankruptcy—Evidence—Bankrupt's Public Examination.

The answers of a bankrupt on his public examination are not admissible in evidence in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt.

This was a special case stated for the opinion of the High Court by the judge of the county court at Birmingham. It arose out of a motion by the trustee in bankruptcy against a creditor of the bankrupt to set aside as fraudulent preferences certain transactions between the bankrupt and the creditor The trustee based his application upon the evidence given by the bankrupt on his public examination. The creditor objected that the evidence was not admissible against him, and the county court judge rejected it, but at the request of the trustee stated this case for the opinion of the High Court.

The questions for the opinion of the Court were—

(*a.*) Whether the answers of the bankrupt on his public examination are admissible in subsequent motions in the same bankruptcy as against parties other than the bankrupt himself.

(*b.*) Whether such answers, if not generally admissible, are nevertheless admissible as against a creditor in a motion to set aside a transaction as a fraudulent preference.

Muir Mackenzie, for the Board of Trade. The public examination of the bankrupt stands on a different footing from a private examination under s. 27, inasmuch as in the former proceedings any creditor can appear and cross-examine him. In the present case it was only intended to use the answers of the bankrupt as an affidavit, and it was open to the respondent to give notice that he would require the bankrupt to attend for cross-examination, like any other deponent. This course would be a saving of expense, and seems to have been the practice under the old Acts: *Ex parte Crosbie* (1); *Ex parte Chambers* (2); *Ex parte Crosley* (3). At any rate, the Court can now, in the exercise of its discretion under r. 66 of the Bankruptcy Rules, admit the evidence.

(1) 2 M. & A. at p. 397. (2) 2 M. & A. at p. 464. (3) 1 Dea. 107, 111.

1887

IN RE BRÜNNER.

CAVE, J. I am of opinion that this examination is not receivable in evidence. No direct authority can be cited for the proposition that the examination of a witness taken in some other proceeding is evidence against a person who was not a party to that proceeding, and who did not, in fact, have any notice that the evidence was going to be used against him, and that he might cross-examine. But it is said, and this is all that can be said in favour of the proposition, that there are some expressions in two or three old cases from which it may be gathered that these examinations were admissible. But I confess I am unable to gather anything in the shape of a positive judicial decision in those cases that these examinations are admissible. In all of them the dicta of the learned judges refer, not to the examination of the bankrupt alone, but to the examination of other parties; and therefore, if they go the length of stating that these examinations are admissible in evidence, a man might find himself confronted with an examination, taken ostensibly for an extremely different purpose, which might raise a primâ facie case against him, and put him to great trouble and expense to get rid of; and if it were a matter which he was not himself able to contradict by his own evidence, it might place him in a very serious difficulty. Take, for instance, the very case which is in question here. The real question is, what was the motive and intent with which the bankrupt performed a certain act? This is a matter which the creditor cannot directly contradict. The only possible way in which he can contradict what is alleged by the debtor is by indirect evidence—evidence of the bankrupt's conduct, and so on—and it appears to me that it would be in the highest degree unfair that a statement made by the bankrupt when he is going through his public examination, and is therefore being examined with regard to all his past transactions, should be evidence against every creditor who has had anything to do with the bankrupt, and even against persons who have had absolutely nothing to do with him, but with regard to whom it might be desired to obtain an order to restore something that the trustee alleges has been made over to them by the bankrupt by way of fraudulent preference. The convenience is entirely on the side of the trustee, whom it places in an enviable position; but I think that, sitting as I do to administer justice between the trustee

1887

IN RE BRÜNNER.

on the one hand and the creditor and those against whom he may have claims on the other, I must not look at the convenience of the trustee alone, but must consider the general convenience of all parties and the interests of justice. It appears to me, therefore, that it would be a very grave innovation to say that an examination taken under such circumstances is, as against everybody who may be referred to in that examination, and under all circumstances, to be treated as primâ facie evidence which the creditor must get rid of by producing counter evidence, or by cross-examination of the bankrupt, or in the best way he can. I think that would lead to great evils. In the first place, there would be a natural tendency on the part of the trustee to rely upon expressions used by the debtor in an examination of that kind. Generally, the debtor is a very unsatisfactory witness under all circumstances, and is still less to be relied on when he is giving evidence that tends to excuse himself; and the consequence of allowing that to be done would be greatly to increase the costs and also the vexation and annoyance to persons who have had anything to do with the bankrupt. I am of opinion therefore that, unless I can find either in the Act a special enactment that this thing shall be done, or in some of the earlier cases that it has been solemnly adjudged by a Court of undoubted knowledge and capacity not merely that this was the practice, but that this was the right thing which ought to be allowed and ought to be done, I ought not to countenance a practice of this kind. Of course, if people choose for the sake of avoiding expense to agree that the examination shall be read, there is nothing in the world to prevent their doing so—that is open to all parties—but that in the absence of any such agreement the trustee should have a right to read an examination taken in the absence of the other side about a matter which may not have been brought with great particularity to the attention and recollection of the bankrupt, or which may have been slurred over very hurriedly, would be to introduce a great innovation, which I certainly decline to do. I am therefore of opinion that the learned judge took the proper course in refusing to receive this evidence.

Solicitor: *W. Murton.*

H. L. F.

THE GLOUCESTERSHIRE BANKING COMPANY, LIMITED *v.* EDWARDS.

1887
July 1.

Sheriff—Under-sheriff—Executor—Vacancy of Shrievalty—Liability of Under-sheriff—Proceeds of Execution wrongfully retained during Vacancy of Shrievalty—Form of Action—3 *Geo.* 1, *c.* 15, *ss.* 8, 11.

Where an under-sheriff acting as sheriff during the vacancy of the shrievalty under 3 Geo. 1, c. 15, ss. 8, 11 (1), wrongfully retains the proceeds of an execution, an action for money had and received is maintainable against him or his executors by the execution creditor to recover the sum so wrongfully retained.

MOTION by the plaintiffs for a new trial on the ground of misdirection.

This action was brought by the plaintiffs, who had recovered judgment for 497*l.* 11*s.* 8*d.* and costs in an action in which they were plaintiffs and one Ward was defendant, against the defendant as executor of Edward Butler Edwards, formerly under-sheriff of the county of Monmouth, for negligence and extortion, and for making a false return in respect of the execution of a writ of fi. fa. for the amount recovered, which had been issued to William George Cartwright, the sheriff of the county, and in the alterna-

(1) 3 Geo. 1, c. 15, s. 8: "And whereas great inconveniences have arisen by the death of sheriffs, during the time of their shrievalty: Be it enacted that if any high sheriff of any county of England or Wales shall happen to die before the expiration or determination of his year, or before he be lawfully superseded, in such case the under-sheriff or deputy sheriff by him appointed shall nevertheless continue in his office, and shall execute the same and all things belonging thereunto, in the name of the said deceased sheriff, until another sheriff shall be appointed for the said county and sworn, in manner as is hereinafter directed: and the said under-sheriff or deputy sheriff shall be answerable for the execution of the said office in all things and in all respects and to all intents and purposes whatever, during such interval, as the high sheriff so deceased would by law have been if he had been living; and the security given to the high sheriff so deceased by the said under-sheriff, and his pledges shall stand, remain, and be a security to the king his heirs and successors and to all persons whatsoever for such under-sheriff's due performance of his office during such interval."

Sect. 11: "Provided that nothing in this Act contained shall anyways hinder or prevent . . . . nor to hinder the under-sheriff in case of the under-sheriff's death when he acts as high sheriff from constituting or appointing a deputy, as he is hereby empowered to do."

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

tive for money had and received to the use of the plaintiffs by Edward Butler Edwards as such under-sheriff. The sum claimed as damages for the alleged breaches of duty amounted to 68*l.* 6*s.* 3*d.* The same sum was claimed as money had and received. The plaintiffs further, in respect of 32*l.* 1*s.* 9*d.*, parcel of 68*l.* 6*s.* 3*d.*, which was alleged to have been extorted, claimed under 29 Eliz. c. 4 (1), treble damages for extortion.

At the trial before Lord Coleridge, C.J., at the London sittings it appeared that in November, 1883, Mr. W. G. Cartwright was sheriff, and Mr. E. B. Edwards, a solicitor practising at Pontypool, was under-sheriff, of Monmouthshire. In the same month the plaintiffs obtained judgment in an action brought by them against one Ward for 497*l.* 11*s.* 8*d.* and costs, and a writ of fi. fa. for this amount, together with the costs of the execution, was issued to Mr. Cartwright as sheriff, and received by Mr. Edwards as under-sheriff of Monmouthshire. The sheriff's officer took possession of Cumwey Farm, of which Ward was tenant, on the same day. Soon after notice was served on the sheriff of a claim by the landlord of Cumwey Farm for 250*l.* in respect of arrears of rent under statute 8 Anne, c. 14. In December the execution debtor presented a petition for liquidation by arrangement, and the sheriff was restrained by the Court of Bankruptcy from proceeding further with the execution till January 1, 1884. On January 2, 1884, the sheriff died. On January 11, 1884, before the appointment of his successor, which was not made till March, a sale of the effects of the execution debtor took place under the execution, the gross amount realised being 486*l.* 8*s.* 9*d.* In May, 1884, the under-sheriff made a return to the plaintiffs in the name of the late sheriff, according to which the sum due to the plaintiffs in respect of the execution, after deducting the rent paid to the landlord and the sheriff's expenses, was 135*l.* 1*s.* 6*d.*, and he remitted the sum to the plaintiffs. The plaintiffs disputed the correctness of the return, and claimed a further sum of 68*l.* 6*s.* 3*d.* as due to them under the execution. With the exception of a part of the possession money, all the sums on the credit side of the account were charged during the vacancy of the shrievalty. On

(1) *I.e.*, three times the amount of damages awarded by the jury.

November 9, 1884, the under-sheriff died, and on February 20, 1885, his will was proved by the defendant.

According to the statement of claim (1) the negligence imputed consisted in the under-sheriff's having failed to deduct from the rent paid to the landlord a sum representing land tax and property tax payable, according to the terms of the lease of Cumwey Farm, by the landlord, which had been applied for and paid to the officers of the revenue after the sheriff's officer had taken possession of the premises; (2) the extortion imputed consisted in the under-sheriff's having made illegal charges in respect of possession money, poundage, and mileage; and (3) the return made by the under-sheriff was alleged to be false, inasmuch as the sum which it was claimed should have been deducted was not in it deducted from the rent, and because it contained credit items in respect of the charges for possession money, mileage, and poundage, which were alleged to be illegal.

It was contended by counsel for the defendant, that under 3 Geo. 1, c. 15, ss. 8 and 11, the Act which defines the position of the under-sheriff during the vacancy of the shrievalty, no action lay against the under-sheriff in respect of any of the matters mentioned in the statement of claim, and that if any action lay, such action was one for tort, and not having been brought "within six calendar months" after the defendant had "taken upon himself the administration of the estate and effects" of the testator, was barred by the Statute of Limitations (3 & 4 Wm. 4, c. 42), s. 2. In support of this contention the defendant was called and proved that he arranged for the under-sheriff's funeral and gave receipts for moneys due to him immediately after his death on November 9, 1884. This was not disputed. Counsel for the plaintiffs contended that the action was for money had and received, and was maintainable under the statute 3 Geo. 1, c. 15, ss. 8 and 11, by the plaintiffs as execution creditors against the under-sheriff for money improperly retained by him during the vacancy of the shrievalty.

The Lord Chief Justice held that the action was one for tort, and was barred by the Statute of Limitations. He withdrew the case from the jury, and gave judgment for the defendant.

Bosanquet, Q.C., (*Gwynne James*, with him), for the plaintiffs.

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

The action is substantially for money had and received, and is maintainable under statute 3 Geo. 3, c. 15, ss. 8, 11, against an under-sheriff at the suit of an execution creditor, if the under-sheriff can be shewn, while acting as sheriff under the statute during the vacancy of the shrievalty, to have retained in his hands money which he was bound to have paid over to the execution creditor. The action lies also against the executors of an under-sheriff who has acted as sheriff under the statute.

The action lies against a sheriff: *Longdill* v. *Jones* (1), and against the executors of a sheriff: *Perkinson* v. *Gilford* (2); *Packinton* v. *Culliford*, temp. Car. 1. (3) The effect of 3 Geo. 3, c. 15, ss. 8, 11, "the said under-sheriff shall be answerable for the execution of the said office in all things and in all respects and to all intents and purposes whatever, during such interval, as the high sheriff so deceased would by law have been if he had been living" is to make the under-sheriff the statutory acting high sheriff with the liability of a high sheriff to an execution creditor in respect of an execution.

[He was stopped.]

Crump, Q.C., and *A. J. Ram*, for the defendant. If the action is to be treated as a claim for money had and received it is clear that, apart from 3 Geo. 3, c. 15, such an action cannot be maintained by an execution creditor against an under-sheriff. The under-sheriff covenants with the sheriff and gives security for the due performance of his duties, one of which is the execution of writs. But he has no contract with execution creditors and no duty towards them. Here the writ was issued before the shrievalty became vacant, and was delivered to the testator of the defendant as under-sheriff before he became acting high sheriff under the statute. The statute creates no right of action against the under-sheriff. The effect of s. 8 is merely that his liability on his bond continues while the office of sheriff is in commission, the Crown being substituted for the deceased sheriff as obligee.

Substantially the claim is for tort, damages for negligence, extortion and a false return by the testator of the defendant while acting as sheriff. This action, not having been brought

(1) 1 Stark. 345. (2) Croke, Car. 539.
(3) 1 Roll. Abr. 921.

within six months of the administration, is out of time under 3 & 4 Wm. 4, c. 42, s. 2.

The claim for money had and received arises out of the same matters as that for damages for alleged breaches of duty, and the plaintiffs, having elected to sue the defendant for damages for breaches of duty in respect of which his testator is protected by the Statute of Limitations, ought not to be allowed to claim as money had and received to their use the damages which the Statute of Limitations prevents them from recovering.

[They cited *Hitchin* v. *Campbell* (1); *Powell* v. *Rees* (2); *Smith* v. *Baker*. (3)]

The remedy of the plaintiff is against the executors of the high sheriff to whom the defendant was bound to account for the proceeds of the execution.

DAY, J. With all respect to the Lord Chief Justice, I think that this action, in so far as it is a claim for money had and received, can be maintained. The writ in question was executed by the under-sheriff of Monmouthshire during the interval between the death of the sheriff who appointed him and the appointment of the successor to that sheriff. The writ was in fact delivered to the first sheriff, and possession of the farm was taken on the sheriff's behalf by his officer during the shrievalty, but the sheriff did not live to execute the writ by converting the chattels seized into money. Had he lived, he would have done this, as he does many of his ministerial acts, through the under-sheriff. Upon his death the statute 3 Geo. 1, c. 15, which provides for the due discharge of the functions of the shrievalty during the interregnum, obliges the under-sheriff to "act as high sheriff" (sect. 11), and renders him "answerable for the execution of the office in all things and in all respects and to all intents and purposes whatsoever during such interval" before the next appointment "as the high sheriff deceased would by law have been if he had been living." The statute effects a complete change in the position of the under-sheriff. While the sheriff lives he and his surety are liable to the sheriff on the bond which

(1) 2 W. Bl. 778. (2) 7 A. & E. 426.
(3) Law Rep. 8 C. P. 350.

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

Day, J.

they have executed for any nonfeasance or misfeasance in executing writs, but the only remedy of the execution creditor is against the sheriff himself. From the moment of the death of the sheriff the under-sheriff becomes to all intents and purposes sheriff, and the remedy of the execution creditor is against the under-sheriff under the statute. But for the statute the execution creditor might be without a remedy. Certainly he could not, as has been suggested, sue the executors of the deceased sheriff, for the money alleged to have been had and received to his use could not be traced into the deceased sheriff's hands, as he was dead when it was paid, and therefore could not form part of the deceased sheriff's estate. If it can be shewn that the under-sheriff, while acting as sheriff under the statute, failed to pay over to the plaintiffs money which he received and which belonged to them, the defendant, as the executor of the under-sheriff, is liable to pay this sum to the plaintiff as money had and received to their use. It is to be regretted that a very plain cause of action should have been overlaid with so many technicalities. There must be a new trial.

WILLS, J. I am of the same opinion. It has been argued that the claim for money had and received cannot be supported, because it arises out of the same matters as a claim for damages for breaches of duty, with which it is joined. But I do not think that the cause of action is the same in the two cases. To take a simple test, the only evidence necessary to support the claim for money had and received is proof that the testator of the defendant received a certain sum which belonged to the plaintiffs but did not pay it over, but this evidence would not support a charge of either negligence or extortion. The cases cited as to election, therefore, do not apply. The claim in tort is barred by the Statute of Limitations and cannot be maintained. But the claim for money had and received stands on a different footing, and, if the testator of the defendant was liable to account to the plaintiff, is perfectly good.

The testator held the office of under-sheriff of Monmouthshire. The office is coeval with the shrievalty and of great antiquity. I scarcely think the relation of under-sheriff to sheriff a matter,

as it was put, of contract. It is true that it is customary for the under-sheriff on his appointment to give a bond to the sheriff, and to find a surety for the proper discharge of his duties, but these duties are imposed upon him by law. The sheriff can neither add to nor take from them. One of these duties is the execution of writs. For any misconduct on the under-sheriff's part in the execution of a writ, or any failure to pay over to an execution creditor sums due in respect of an execution, which takes place while the shrievalty is full, the sheriff and not the under-sheriff is liable. When the sheriff dies, but for the statute the under-sheriff would have no power to levy, for the death of the sheriff avoids his appointment, and executions must cease altogether to be levied till a new sheriff has been appointed, and that new sheriff has appointed an under-sheriff.

A remedy for this inconvenience is provided by the statute. Sect. 8 enacts that during the interregnum the under-sheriff shall "continue in his office, and shall execute the same and all things belonging thereunto," one of his principal duties being the execution of writs, "in the name of the deceased sheriff until another sheriff shall be appointed." In the execution of writs non-feasance or misfeasance may occur, but neither can be committed by or attributed to the deceased sheriff. It is idle to suggest that the execution creditor has any remedy against his executors. If the execution creditor has no remedy against the under-sheriff he has no remedy at all. The section proceeds, "such under-sheriff shall be answerable for the said office in all things and in all respects and to all intents and purposes whatsoever during such interval as the high sheriff so deceased would by law have been if he had been living." These words are perhaps scarcely sufficient without more to make the under-sheriff liable, during the interval, to action in every case in which a high sheriff would be liable. But s. 11 expressly empowers the under-sheriff "when he acts as high sheriff" in case of the high sheriff's death, "to appoint a deputy." This shews in my opinion that his position is entirely altered; he is, so to speak, divested of his character as under-sheriff and clothed with that of high sheriff, and I cannot understand upon what ground he should not be liable to an action for the recovery of these sums, as the high sheriff would

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

have been, had he lived. If so, his liability is to account for money received. The action is one of contract, and his executors are also liable. There will therefore be a new trial.

New trial granted.

Solicitors for plaintiff: *Meredith Roberts & Mills, for E. L. Wallis, Hereford.*

Solicitors for defendant: *Johnston Harrison & Powell, for M. Edwards, Pontypool, Monmouthshire, defendant in person.*

H. D. W.

May 17.

WHITE *v.* BYWATER.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Tincture of Opium—Pharmacy Act*, 1867 (31 & 32 *Vict. c.* 121), *s.* 15—*British Pharmacopœia—Standard of Quality of Drugs.*

Upon a complaint under s. 6 of the Food and Drugs Act, 1875, for selling tincture of opium which was not "of the nature, substance, or quality" of the article demanded by the purchaser, it appeared that the drug which was sold as "tincture of opium" by the defendant was deficient in opium to the extent of one third and in alcohol to the extent of nearly one half as compared with the standard prescribed by the British Pharmacopœia:—

Held, that the defendant was liable to be convicted, although the purchaser had not specifically asked for tincture of opium "prepared according to the recipe in the British Pharmacopœia."

CASE stated by a stipendiary magistrate under 20 & 21 Vict. c. 43.

An information was preferred by Sinclair White, medical officer of health for the borough of Sheffield, against George Bywater, a chemist of the borough, for selling to him a certain drug, to wit, 3 ounces of tincture of opium, which was not of the nature, substance, and quality of the article demanded by him, contrary to the Sale of Food and Drugs Act, 1875.

2. The complainant stated that he went to the shop of the defendant, a chemist and druggist in Sheffield, and asked for three ounces of tincture of opium. The defendant in person supplied him with three ounces, for which he paid him one shilling. Sect. 14 of the Act of 1875 was duly complied with, and a quantity

of one third, or one ounce, was given to the defendant, one third, or one ounce, kept by the complainant, and one third, or one ounce, was sent to be analysed.

3. The analyst's certificate, the accuracy of which was not disputed, was to the effect that the sample delivered to him contained the parts as under, compared with the constituents of tincture of opium as deduced from the description of it in the British Pharmacopœia of 1885 :—

	Sample.	B. P. Tincture.
"Alcoholic strength expressed in degrees of proof spirit .	56·8	100·0
"Morphia	0. 23 °/₀	75°/₀
" × 10 Opium	2·3	7·5

That result shewed the proportion of opium in the sample to be less than one third of that contained in British Pharmacopœia tincture, while the proportion of alcohol was somewhat more than half the proper quantity.

4. At the hearing it was contended that the magistrate ought to convict the defendant, because the analysis shewed that the tincture of opium supplied was not in accordance with the British Pharmacopœia of 1885 (see p. 427).

5. On the part of the complainant, evidence was given by himself, and by the public analyst for the borough, and T. G. Wilkinson, the president of the Sheffield Pharmaceutical Society, who deposed that "tincture of opium" was a well-understood term in the trade, and that the material sold by the defendant was not of the nature, substance, and quality of tincture of opium as understood by persons usually dealing with that article. They also deposed that the British Pharmacopœia was the only one recognized by the medical profession and by pharmacists generally.

6. No evidence was offered on behalf of the defendant. But, in answer to a question from the Court after the hearing was over, he stated that he got the tincture of opium complained of from the same firm as his predecessor in the shop had got it. He did not deny that the British Pharmacopœia was recognized as a book of authority respecting the preparation of tincture of opium and other drugs.

The magistrate dismissed the complaint, thinking that if the

1887

WHITE v. BYWATER.

purchaser had in some way specifically asked for tincture of opium made according to the recipe in the British Pharmacopœia, and had been supplied with tincture of opium which professed to be so, there would be a ground of complaint; but that, in the absence of such special request, the complaint made did not lie, inasmuch as the analyst's certificate shewed that the purchaser got "tincture of opium," which was what the complainant asked for, although to him and others it had a special meaning.

The question for the opinion of the Court was whether or not under the circumstances above shewn the magistrate ought to have convicted the defendant of the offence imputed to him.

Wormald, for the appellant. The case shews a distinct breach of the Act, the article supplied by the respondent being totally different in substance and quality from that demanded. The 15th section of the Pharmacy Act, 1867 (31 & 32 Vict. c. 121), prohibits the compounding of any medicines of the British Pharmacopœia except according to the formularies of that Pharmacopœia, under a penalty of 5*l*. The magistrate was of opinion that he was not bound to convict the respondent, because at the time of the purchase the appellant did not specifically demand to be supplied with tincture of opium prepared in accordance with the British Pharmacopœia. In that he was clearly wrong. The thing supplied was not the article of commerce known as tincture of opium. No specific request was necessary.

The respondent did not appear.

LORD COLERIDGE, C.J. The question referred to us is, I think, disposed of by what is stated in the case. The evidence of three competent witnesses shews that the article supplied to the purchaser was not of "the nature, substance, or quality" of the article demanded by him. It was proved or admitted that the tincture of opium supplied by the respondent was not in accordance with the standard quality prescribed by the British Pharmacopœia. I am, therefore, though somewhat reluctantly, bound to come to the conclusion that the respondent ought to have been convicted of the offence with which he was charged, and that the case must go back to the magistrate with our opinion to that effect.

1887

WHITE v. BYWATER.

A. L. SMITH, J. I am of the same opinion. The customer asks for "tincture of opium." That must mean the article known in commerce as tincture of opium. The thing supplied to him was not tincture of opium of commerce, but an article of very inferior substance and quality. That being so, the respondent was guilty of the offence charged, and ought to have been convicted.

Case remitted.

Solicitors for appellant: *Richard Smith & Wilmer, for John Yeomans, Town Clerk of Sheffield.*

J. S.

KELLARD *v.* ROOKE.

April 5.

Negligence—Employers' Liability Act, 1880, 43 & 44 *Vict. c.* 42, *s.* 1, *sub-ss.* 2, 3 —*Negligence of Fellow Workman—Person "intrusted with Superintendence"* —*Ganger or Foreman of Labourers.*

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff with other workmen was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. The bales were hauled to the hatchway and dropped down to the workmen below; B., who worked on the deck, giving a signal to the men below before the bales were dropped. The plaintiff, who was below, was injured by a bale which, according to his statement, came down without any warning:—

Held, that the plaintiff was not entitled to recover, for there was no evidence that his injury was caused by the negligence of a person who had "any superintendence intrusted to him, whilst in the exercise of such superintendence," or by reason of the "negligence of any person in the service of the defendant to whose orders or directions the plaintiff was bound to conform."

APPEAL by the plaintiff in an action under the Employers' Liability Act, 1880, in the county court of Southwark.

At the trial it appeared that the plaintiff was employed with other workmen by the defendant to assist in stowing bales of wool on board the steamship *Albatross* in St. Katharine's Dock. The workmen were divided into gangs, the foreman of the plaintiff's gang being one Bodfield. The bales were hauled to the hatchway, and dropped down for the purpose of being stowed; Bodfield, who was at work on the deck, giving a signal to the men below before the bales were dropped. While the plaintiff

1887

KELLARD v. ROOKE.

was at work below he was struck and injured by a bale which, according to his statement, came down without any warning.

The judge nonsuited the plaintiff, on the ground that there was no evidence that Bodfield was a "person who had superintendence intrusted to him," within s. 8 of the Act. (1)

Ellis, (*Cock*, *Q.C.*, with him), for the plaintiff. The nonsuit was wrong. Bodfield was a fellow-workman, who had "superintendence intrusted to him," or "to whose orders the plaintiff was bound to conform," and the case is therefore within s. 1 of the Act, sub-s. 3: *Millward* v. *Midland Ry. Co.* (2)

Tatlock, for the defendant. The "superintendence" referred to in s. 1, sub-s. 2, is that of a person whose sole duty is that of superintendence, and who is not ordinarily engaged in manual labour. Bodfield was not such a person, for he was engaged in the same manual labour as the plaintiff.

HAWKINS, J. I am of opinion that this nonsuit ought not to be disturbed. With reference to the sub-section which has been relied on (sub-s. 2 of s. 1), and which entitles a workman to compensation for an injury caused to him "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence," I made this observation in the course of the argument,—Supposing Bodfield (the person who is said to have been intrusted with superintendence) to be for any purpose a superintendent, there is no question at all that he was also engaged in manual labour, that is to say, he was engaged in hauling and throwing these bales of wool into the ship's hold; and the injury was sustained by the plaintiff in consequence of a bale put in motion by Bodfield, in the exercise of a duty that was cast upon him as an ordinary workman engaged in such manual labour, falling upon the plaintiff. Assuming that to be so, it comes to nothing more than this, that the man who was a superintendent for some purposes, and who was also an

(1) 43 & 44 Vict. c. 42, s. 8: "The expression 'person who has superintendence intrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

(2) 14 Q. B. D. 68.

ordinary workman engaged in the work in which the plaintiff was likewise engaged, was guilty of negligence, whereby his fellow-workman was injured. But, how can that be said to be an injury caused by Bodfield whilst he was in the exercise of such superintendence? The negligence of Bodfield was whilst in the exercise of the manual labour in which he was engaged (see s. 8), and not in the exercise of superintendence at all. I think that disposes of the second sub-section of s. 1. With regard to sub-s. 3, the words of which are, "By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed,"—supposing I were to concede for the purpose of the discussion (which I by no means do) that Bodfield was a person in the service of the employer to whose orders or directions the plaintiff at the time of the injury was bound to conform, I fail to see any order which was given by him to which the plaintiff was bound to conform. And, if Bodfield gave him no order, the injury the plaintiff complains of could not have resulted from his having conformed to an order which was never given.

A. L. SMITH, J. I am of the same opinion. In this case, the plaintiff must bring himself within either sub-s. 2 or sub-s. 3 of s. 1. He must allege and prove that the accident occurred to him by reason of the negligence of a person in the service of the employer who had superintendence intrusted to him, whilst in the exercise of such superintendence,—or, in the alternative, he must allege and prove that the injury occurred by reason of the negligence of a person in the service of the employer to whose orders or directions he at the time of the injury was bound to conform and did conform, and that such injury resulted from his having so conformed. Now, it must be patent to any one reading these two sub-sections that the legislature only intended to fix the master with liability for the negligence of two classes of persons, viz. one, a person who has what may be termed superintendence, and another, a person to whose orders the workman is bound to conform. This accident, as it is alleged, took place by reason of the negligence of Bodfield, a person in the service of the defendant

1887

KELLARD v. ROOKE.

A. L. Smith, J.

who had superintendence intrusted to him, he having whilst in the exercise of such superintendence thrown down a bale of wool into the hold of the ship where the plaintiff was working, and injured him. At the close of the plaintiff's case, it was submitted for the defendant, that Bodfield did not come within the description of superintendence mentioned in the Act, or, in other words, that the case did not come within sub-s. 2 of s. 1; that "superintendence" in that sub-section must refer to a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. That is the definition of the expression given in s. 8 of the Act. If you have a person whose sole or principal duty it is to superintend the work of others, the master will be liable for injuries to those who act in obedience to his orders, even though such superintendent should himself casually do manual labour. But, how can it be said that a "ganger," the foreman of a gang of labourers, who is working with his hands all the day, is a person whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour? It is only necessary to state the proposition, to shew that the case is not within s. 1, sub-s. 2. That, as it seems to me, was the only ground taken before the learned judge of the county court. But it is now said that the county court judge ought not to have nonsuited the plaintiff, because Bodfield, if not intrusted with general superintendence, was at all events a person to whose orders the plaintiff was bound to conform, within sub-s. 3 of s. 1. I doubt if that point is open to the plaintiff upon this appeal: but I will assume that it is; and, if I thought there was evidence upon which the learned judge might have given judgment for the plaintiff, I should have been disposed to send the case down for a new trial,—the plaintiff bearing all the costs up to the present time. But, upon the evidence which was before him, I am satisfied that the judge ought not to have found that Bodfield was a person within the sub-section; and for this reason,—a mere foreman of a gang of labourers will not do: the master is to be liable where the injury is caused "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform." That is the

1887

KELLARD v. ROOKE.

A. L. Smith, J

person for whose negligence the master is responsible. But sub-s. 3 does not stop there: it goes on, "and did conform, where such injury resulted from his having so conformed." The meaning of sub-ss. 2 and 3 in my judgment is this,—the employer is to be liable for the negligence of one whom he places in the position of being intrusted with the giving of orders, where the workman is injured by reason of his having conformed to an order or direction which he receives from such person. But, where is the evidence here that Bodfield (assuming him to have been so intrusted) did give any order by conforming to which the plaintiff sustained injury? There is no such evidence. But the plaintiff's counsel relied upon *Millward* v. *Midland Ry. Co.* (1) as an authority to shew that an order may be implied from the circumstances. The ratio decidendi, however, in that case was, that the plaintiff was acting under the orders of a person whose direction he was bound to obey, and was doing with the knowledge of that person what it was the ordinary course of business for him to do; whereas here, the injury sustained by the plaintiff was caused by the inadvertent act of Bodfield whilst in the execution of his duty as a fellow-labourer of the plaintiff. The judgment of nonsuit must be upheld.

Appeal dismissed.

Solicitors for plaintiff: *Keene, Marsland, & Bryden.*
Solicitors for defendant: *Watson, Sons, & Room.*

(1) 14 Q. B. D. 68.

J. S.

1887
April 19, 20, 21;
June 23.

THE QUEEN, on the Prosecution of the NATIONAL LIBERAL LAND COMPANY, LIMITED *v.* THE INHABITANTS OF THE COUNTY OF SOUTHAMPTON.

Bridge—County, Liability of, to repair—Bridge not built in existing Highway—Acquiescence by County, Evidence of—Statute of Bridges (22 *Hen.* 8, *c.* 5)*—Indictment—Practice—Verdict of Acquittal—Motion for New Trial by Prosecution.*

Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to and the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county.

Reg. v. *Inhabitants of the County of Southampton* (17 Q. B. D. 424) in part dissented from.

Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted; but under very special circumstances the Court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment.

Rex v. *Wandsworth* (1 B. & Ald. 63) approved.

Motion on behalf of the prosecutors for a new trial of an indictment against the inhabitants of the county of Southampton for non-repair of the eastern half of a bridge over the river Itchen. The facts of the case are fully set out in the report of a previous motion for a new trial (17 Q. B. D. 424), but a short summary of them, so far as they are material to the present report, is given here.

In 1882 the prosecutors acquired land situated on the left bank of the river Itchen, in the county of Southampton, and being desirous of connecting it with the town of Southampton on the right bank, they built a bridge over the river. On the county side of the river the bridge adjoined building land of the prosecutors, but it was not approached on that side by any public highway. In 1883 the bridge was opened for traffic together with a new road over the building land called Cobden

Avenue, which had been constructed in connection with the bridge; on the other side the bridge was connected with an old highway, which ran into the town. The bridge and the new road were dedicated simultaneously to the public by a public ceremony on the day of the opening. The bridge, which was extensively used by the public, having fallen into disrepair, the defendants were indicted for its non-repair upon an indictment containing four counts; the first for non-repair of the whole bridge; the second for non-repair of the approaches at both ends; the third for non-repair of the eastern half of the bridge; and the fourth for non-repair of the eastern approach. At the trial, before Stephen, J., at the Bristol Winter Assizes, 1886, the learned judge directed a verdict for the defendants upon the first, second, and fourth counts, but left the case to the jury upon the third count, and a verdict of guilty was found upon that count.

Cross rules nisi for a new trial were obtained by the parties, but upon argument before a Divisional Court, consisting of Wills and Grantham, JJ., the rule obtained by the Crown was discharged, while the rule of the defendants for a new trial of the third count of the indictment was made absolute. It is not necessary here to set out the grounds of the judgment of the Divisional Court, which is reported at 17 Q. B. D. 424, but for the purposes of the present report it is enough to say that as regards the third count the judgment of the Court proceeded upon the ground that, the bridge not having been built in an existing highway, the user by the public of the bridge was not evidence of acquiescence by the county in its building and dedication.

A fresh trial of the third count of the indictment took place at the next Bristol assizes, before Mathew, J., when a verdict of not guilty was returned. The prosecutors now moved for a new trial on the grounds (among others) (1) that the judge wrongly directed the jury that they ought to acquit the defendants unless they had accepted the dedication of the bridge with the intention

(1) Other points arose in the case besides those here reported. But, inasmuch as they are not noticed in the judgment of the Court, the facts and arguments in regard to them are omitted.

1887

THE QUEEN v. INHABITANTS OF COUNTY OF SOUTHAMPTON.

of keeping it in repair, and that he wrongly left the question of the obligation to repair the bridge to the jury, whereas such question was upon the evidence a question of law, and not of fact. As the summing-up of Mathew, J., to the jury met with the unanimous approval of the Court as containing a correct exposition of the law upon the question, it is here reported at length.

MATHEW, J. Gentlemen of the jury, the defendants in this case are the inhabitants of the county of Hants. That somewhat vague and indeterminate description is the one by which the present defendants are prosecuted, and the prosecutors, who, we now are informed, are the National Liberal Land Company, insist that the inhabitants of the county accepted a gift of this bridge from them, the Land Company, with the obligation, from the time they accepted it, to keep that bridge in repair. Now that is the case which is sought to be made out by the prosecutors against all the inhabitants of the county. The inhabitants of the county say, "We never took upon ourselves any such burthen, and you cannot point to any act of any constituted authority that, under any statute, or by usage, or by any other understanding, could be fairly said to represent us as a body, and you cannot shew that we ever accepted the gift of the bridge with the consequent liability to keep it in repair." Upon the evidence which has been given each party has claimed the verdict as matter of law.

Now, gentlemen, the law upon the subject is certainly left in some degree of uncertainty. The whole law of dedication to a community is a difficult topic to deal with, because it is not easy where a community does not act through properly constituted representatives to prove the assent of every individual, or the assent of such a majority of all the individuals as to lead to the conclusion that the general body agreed. In my view of the law the wiser and safer course is to put to you, as shrewd men of business, the question whether you think there has been any such action on the part of the inhabitants of this county as to indicate that they accepted this gift with the consequent burthen—the inhabitants generally, the occupiers, the persons

here indicted as those on whom that burthen is sought to be cast. The question is one which has perplexed lawyers but may give you very little trouble.

Now, gentlemen, what is the history of this property? I can well understand a case being presented to a jury where for a long time the necessity had been felt of constructing a bridge in a particular locality and where public meetings had been held indicating the necessity for such communication, and where applications had been made to quarter sessions and other public bodies to aid in the construction of a bridge, and where some one had stepped forward, after objection had been made that the expenditure would be too great—some man of public spirit, and said, "Now I will build the bridge." I can suppose the jury saying under such circumstances that there was a public demand for it, and a man of public spirit found the money to build the bridge, and he did that for the public benefit, and the public took it with the understanding that they would be liable for the repair of it. In such a case as that, (I do not say that it would be the law,) I should not be surprised, if the inhabitants after some years had refused to bear their burthen, that the jury said, "We are satisfied after what took place with reference to the erection of this bridge that it was to public munificence that the county owed the bridge, and it was accepted on behalf of the public on the understanding that the man who found the money to build it should not be left under the obligation of keeping it in repair." As I say, I can understand that, but is this a case of that sort? Now you have heard the inhabitants of the county twitted with their ingratitude to the Liberal Land Company. Here was 17,000*l.* worth of iron handed over to this ungrateful county and the county took it, and then when called upon to lay out a few pounds in painting, it declines to do it. Gentlemen, do you really think that the Land Company had any regard to the county in the construction of that bridge? It is all very well to bring down an eminent politician, and to ask the great man to hand over the bridge to the mayor of Southampton. The mayor of Southampton is not one of the present defendants. He is mayor of the town of Southampton, a county of itself, and a different county from this. Certain minds of an ingenuous

1887

THE QUEEN v. INHABITANTS OF COUNTY OF SOUTHAMPTON.

Mathew, J.

character might at first be disposed to infer that what was being done was done purely from public spirit, and from no private motive. But what do we know about it now? We know now why that bridge was built. The National Liberal Land Company had bought an estate on the other side of the river. We are not told what they gave for it, but we know what it is worth now. That estate, probably consisting of green fields, was cut off from Southampton and from the rest of the neighbourhood by that intervening river, the Itchen, and the first thing to do to bring those pastures into the character of a building estate, was to connect them with the town of Southampton and coax the city across the river into the meadows on the other side. For that reason, and for that reason only, I should think (it is entirely for you) the 17,000*l.* was paid. That is a good round sum, and the estate must have been acquired under favourable circumstances to admit of that expenditure, and you will have very little doubt I should think that it was the fact that the bridge was put there which gave the property the value of 300*l.* an acre, which is said to be its present price. Those are the circumstances under which this bridge came into existence, and I asked the learned counsel to point out to me any case in which a bridge, having been built for purely private purposes in the first instance, and where there was nothing more than the fact that the public used it afterwards, it was held that there had been a dedication to and an acceptance by the public, and although many cases were referred to, I am not aware of any such authority.

Now, gentlemen, that being so, and those being the circumstances under which the bridge came into existence, it is said, "Why did not some one object to what this company were doing, if the inhabitants of the county were not afterwards to repair the bridge?" But why should any one object? The individuals who lived in the neighbourhood had the convenience of a bridge. It was to be a free bridge, and it was desirable, of course, that the estate should communicate readily with the town. It is said that the navigation was interfered with. What proof is there that it was interfered with, so that anybody would be likely to prosecute this company for what it was doing? It is said that

the company would have been indicted unless the whole county agreed, because the approach to the Hard on the eastern side of the river was interfered with. But steps were left for anybody who wanted to go to the Hard just as before. What evidence of assent of the whole body is there? That assent is sought to be proved by user, but you will ask yourselves how the county could have prevented user. It is said that this road brings Southampton into easy communication with Chichester and Portsmouth. Is that the reason why the bridge was put there? People had been living there for centuries without it: do you think there was on this account any anxiety on the part of the county to have a bridge there? It is nonsense, it appears to me (but it is entirely for you), to say that any such motive induced the making of that bridge. What object had this company in bringing the county nearer Portsmouth and Chichester? None. They wanted to bring their estate nearer Southampton. They appear to have known perfectly well what this structure involved, and from the first to have had considerable anxiety to get the county to accept it. But they also appear to have had considerable doubt as to how the county was to be got at. They applied to the justices in quarter sessions, who I am by no means clear would in law represent the county, but there is very strong evidence that the sessions did not undertake the repair of this structure. The quarter sessions did nothing in the world to lead the land company to suppose they would accept the burthen, and the company had early intimation that the county did not, as far as quarter sessions could decide the matter, undertake the burthen of these repairs. You know shortly after the solemn dedication of this bridge the embankment on one side of it began to give way, that there was what is called a settlement, and that was within a few months almost after the bridge was constructed. No one can predict to what extent the settlement of a structure of that kind may go, or what may take place after it has been standing for some time. In this case there was a subsidence, and we do not know what it cost to set it right, but it was set right by those who are suggested to be the real owners of the structure, namely, the land company who built the bridge. Since then, there appears to have been a further settlement. Now what took place with reference to that

1887

THE QUEEN v. INHABITANTS OF COUNTY OF SOUTHAMPTON.

Mathew, J.

is worth adverting to. This company placed itself in communication with the surveyor of the county. The surveyor had certain powers under an Act of Parliament which has really no bearing on the question of liability whatever. It was one of the conditions of being allowed to build the bridge that they should have his sanction under that Act of Parliament, and they applied for his sanction, and he does appear to have superintended the erection of the bridge in a certain sense, but he never was satisfied about these approaches, and never gave a final certificate in respect of them. The people who tell you that they have dedicated the bridge to the public, and that the public have accepted it, go on discussing with him what final steps are to be taken, and they do some repairs long after the period at which the bridge is thrown open and, as they say, the repairs taken from their shoulders and put on to the shoulders of the public. What is the explanation of this? If they are right they might have said, even if the bridge fell, "We are entitled to come down upon you, the county, not only to repair, but to keep the bridge standing, which is what you had undertaken to do when you accepted the dedication from us." But then there was something more. A few months after this bridge had been thrown open and presented with its three coats of paint to the mayor of Southampton, it wants a new coat of paint, or rather two coats. That requires an expenditure of 100*l.* or thereabouts, and we are told that the expenditure, under very favourable circumstances, would require to be renewed every two years; but the witness was not prepared to say it might not be in a much less time, because this bridge is in an unusually exposed position, and so close to sea-water that the process of rust and corrosion may go on very rapidly. Not a word was said at the opening ceremony of any such liability. The county might well think twice before they accepted a bridge with an obligation of that sort upon the inhabitants, who found their way to and from Southampton previously without this bridge, and without any inconvenience as far as we can see. Why should the county carry this burthen? What was the consideration? The county was not obliged to come to the aid of the company. The erecting of this bridge might be an accommodation to people coming from a distance, but it would be far more convenient to

those who expected to buy or occupy land on this estate. Gentlemen, I do not know that I can assist you further. You must give your own view about it. Do you believe the inhabitants of this county ever took to this bridge, and are under any obligation to repair it? If you think they are, you will say they are guilty on the third count of this indictment. If you think that is not made out to your satisfaction, you will acquit them.

Charles, Q.C. (*J. V. Austin*, and *Sclater Booth*, with him), shewed cause. First, there can be no new trial at the instance of the prosecution, the proceeding being a criminal one, and having terminated in a verdict of acquittal. Secondly, the Statute of Bridges (22 Hen. 8, c. 5), contemplates only bridges built and broken in existing highways; in such cases acquiescence by the county in the dedication of the bridge is presumed, for its building obstructs the traffic, and the obstruction might be treated as a nuisance, and be the subject of an indictment, if the county thought fit to take proceedings: see per Bayley, J., in *Rex* v. *St. Benedict.* (1) But where the bridge is not built in the line of an existing highway, affirmative evidence of acquiescence, other than that of public user, must be given by the prosecution in order to impose upon the inhabitants the liability to repair. The county authority is the proper body to signify the assent of the county to undertake the repair of a bridge; this, at any rate, is the view taken by the legislature in s. 21 of the Highways and Locomotives Act, 1878 (41 & 42 Vict. c. 77), which provides that under certain circumstances existing bridges which have been erected without the superintendence of the county surveyor, as required by 43 Geo. 3, c. 59, s. 5, may be accepted by the county authority on behalf of the county. In the cases where acquiescence has been presumed from public user of a bridge of public utility, the bridge has been built in a highway: *Rex* v. *West Riding of Yorkshire* (2); *Rex* v. *Bucks* (3); *Rex* v. *Kent* (4). Mathew, J., was right in telling the jury that public use is not public adoption, and the law is correctly laid down in his summing-up.

(1) 4 B. & Ald. 447.
(2) 2 East, 342.
(3) 12 East, 192.
(4) 2 M. & S. 513.

1887

THE QUEEN v. INHABITANTS OF COUNTY OF SOUTHAMPTON.

Rigby, Q.C. (*Bucknill, Q.C., Pitt Lewis, Q.C.*, and *A. Glen*, with him), for the prosecution. The whole question of dedication and acceptance is one of fact for the jury, but the only question left to them by the judge was that indicated in the judgment of the Divisional Court, whether there had been an adoption by the county. It was never explained to the jury that acquiescence by the county need not necessarily be a formal act, and that from the public user of a bridge of public utility they might, if they pleased, infer an acceptance by the inhabitants. To say that there must be affirmative evidence of adoption beyond that of public user and public utility is contrary to the rule laid down by Lord Ellenborough, C.J., in *Rex* v. *West Riding of Yorkshire*. (1)

LORD COLERIDGE, C.J. This is a case which presents some considerable difficulty, but we have come to the conclusion that it may be decided on one very clear point, whether the verdict was obtained in consequence of the misdirection of the learned judge at the trial. The course of litigation has been somewhat remarkable. The prosecutors, for the purpose (as was admitted) of developing a valuable property which was separated from Southampton by the river Itchen, and for the purpose of inducing the inhabitants of Southampton to cross the river and build upon the estate, connected it with the town by the bridge in question. The bridge was built very carefully, and the sum expended upon it was considerable. When it was finished there was in form a most solemn dedication of the bridge to the public at the opening ceremony (although what was done did not amount to a dedication in law), and it was handed over to the mayor and town council of Southampton; since its opening there has been a considerable user by the public of the bridge, using the word "public" in a somewhat limited sense. User by the public has in all cases been treated as an element in determining the liability of the county to repair a bridge; but the word "public" in this connection must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the

(1) 2 East, 342.

neighbourhood who ever use a particular road or bridge. In the present case, however, there is no doubt abundant proof of the user of the bridge by, and of its utility to, the public, confining the meaning of that word to that portion of the public which used it.

The bridge having fallen into disrepair, an indictment for its non-repair was presented by the prosecutors against the inhabitants of the county of Southampton, which was tried in the first instance before my brother Stephen at the Bristol Assizes; and after his summing-up the jury returned a verdict of guilty upon the third count, which was a substantial part of the indictment. Both parties being dissatisfied with this result, cross-motions for a new trial were made to a Divisional Court, consisting of my brothers Wills and Grantham, with the result that the prosecutors' rule was discharged, but that of the defendants was made absolute. The case was accordingly tried a second time before my brother Mathew, the trial being confined to the third count of the indictment, and upon his summing-up the jury returned a verdict of acquittal. The prosecutors now question this second verdict, and the summing-up under which it was obtained, and move for a second new trial.

The first question which presents itself for consideration is whether under any circumstances there can be a new trial of this indictment, the proceeding being a criminal one in form, and having resulted in a verdict of acquittal. To this technical argument (I do not use the word in any depreciatory sense) we accede, and we think that the true view is to be found in the judgment of Lord Ellenborough in *Rex* v. *Wandsworth* (1), where a new trial was refused in a very similar case to the present. In that judgment the law seems to be admirably expressed, and it contains the true rules which govern the practice of this Court upon such applications. If we thought that there ought to be further proceedings in this case we should not grant a new trial, but, following the example of Lord Ellenborough in the case to which I have just referred, we should suspend all further proceedings upon the judgment, so as to give an opportunity for a fresh indictment to be brought against the defendants. We should

(1) 1 B. & Ald. 63.

1887

THE QUEEN v. INHABITANTS OF COUNTY OF SOUTHAMPTON.

Lord Coleridge, C.J.

refuse the rule in form, but give in substance that for which the prosecutors are applying. But we do not propose to take that course in the present case, because upon the important question of substance which was argued before us we are of opinion that the verdict was right and should be sustained.

We think that in all these cases it must always be a question for the jury as to what is the true effect of all the evidence before them as to dedication and adoption, for in every case there must be dedication and adoption in a certain sense; and in the present case it seems to us upon reading the summing-up of my brother Mathew that he endeavoured, and with complete success, to lay down correctly to the jury the law upon the case submitted to them. The opinions which have been given by the learned judges before whom this case has already come seem to be conflicting. I do not stay to inquire whether my brother Stephen at the first trial intended to lay it down as a legal proposition that, granting the building of a bridge by a private person, and that the bridge when built is of utility to, and is used by, the public, those facts would be conclusive against the county on the question of its liability to repair; the learned judge is understood so to have laid down the law, and if he did so, we are of opinion that his view was not correct. Such a view would involve what we conceive to be the unsound proposition that a bridge built by an individual merely for his private purposes would at once become repairable by the county upon its turning out to be of public utility as evidenced by public user. If on the other hand the learned judges in the Divisional Court really did say that, granting the same premises, there must in addition to evidence of public user and public utility be some proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county, then we think that their judgment cannot in its breadth be sustained. To say that public user supplemented by public utility is no evidence to fix the county with the liability to repair is too broad.

In all these cases, therefore, the question is one of evidence for the jury. Utility is but one element to be considered in determining the question of liability, and it is for the jury to say in each particular case whether the amount of utility is sufficient

to satisfy that element, and further whether the amount and character of the user are sufficient to transfer to the county the burden of repair. It may be that a bridge built by a private individual for his private ends becomes in time of great utility to the public, and is largely used by them, and it would be for the jury in such a case to say whether under the circumstances the public utility and user of the bridge were sufficient to bind the county to repair it; the evidence may or may not be sufficient to fix them with liability, but it is for the jury to decide. That we understand to be the way in which my brother Mathew laid down (and it is certainly the way in which he intended to lay down) the law to the jury; we have carefully examined his summing-up, and are unable to extract from it any propositions which are not law, or which are calculated to mislead the jury. The learned judge informs us that he is not dissatisfied with the verdict, and as a satisfactory verdict was returned after a correct statement of the law by the judge, the rule for a new trial must be discharged.

During the argument of the present case several old cases of great authority have been cited to us which contain very important expressions used by Lord Coke, Lord Holt, Lord Mansfield, Lord Ellenborough and other eminent judges, more especially in the cases of *Rex* v. *West Riding of Yorkshire* (1); *Rex* v. *Inhabitants of Kent* (2) and *Rex* v. *Inhabitants of Glamorgan* (3), and we do not desire to intimate the slightest doubt of the correctness of the law laid down in those cases, which we take to be this; that if a private bridge has been built by a private man for his private ends, and it turns out in course of time to be useful to the public and to be used by the public (in the sense of the word which I have explained) those facts are strong and cogent (although not necessarily conclusive) evidence upon which a jury would be warranted in finding, and a judge would be justified in telling them that they might or ought to find (though not as a matter of law but as fact) adoption of the bridge by the county in the sense that I have explained, and consequent liability of the county to repair. We also think that the law laid down in those cases is all the stronger if the bridge

(1) 2 East, 342. (2) 2 M. & S. 513. (3) 2 East, 356 (n).

1887

THE QUEEN v. INHABITANTS OF COUNTY OF SOUTHAMPTON.

Lord Coleridge, C.J.

about which the dispute arises is part of an existing highway, and has its termini in the highway; the argument for the prosecutors would be much more cogent in such a case, for if the bridge were not useful to and used by the public, it would be a nuisance if built in the public highway.

We hold therefore that there has here been no misdirection, and that the law is to be found stated with substantial correctness in my brother Mathew's summing-up.

GROVE, J., POLLOCK, B., and HAWKINS, J., concurred.

Rule discharged.

Solicitor for prosecution: *F. A. A. Rowland.*

Solicitor for defendants: *H. Sowton, for T. B. Woodham, Winchester.*

W. J. B.

July 6.

THE QUEEN, ON THE PROSECUTION OF STEPHEN BURN, *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF POOLE.

Highway — Municipal Corporation — Liability to repair — Urban Sanitary Authority—Highway Act, 1835 (5 *&* 6 *Wm.* 4, *c.* 50)—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 144—*Form of Indictment—Amendment.*

An indictment against a municipal corporation for non-repair of a highway alleged that the highway was in decay, and that the corporation, "acting by the council as the sanitary authority for the urban district," ought to repair and amend the same, &c.; but there was no allegation to shew how the defendants were liable, nor did the indictment conclude with the words "against the form of the statute."

At the trial the judge intimated his willingness to make any amendment within his power; but no amendment was in fact made. A verdict having been found for the Crown:—

Held, first, that the indictment was bad, and that the defendants were entitled to judgment non obstante veredicto.

Secondly, that even assuming the necessary amendments to be made, the defendants were entitled to judgment, there being nothing in the Public Health Act, 1875, to make the urban sanitary authority liable to indictment for non-repair, in the same sense as that in which the parish or other persons liable ratione tenuræ were liable.

Quære, whether an indictment would lie if the preliminary steps before magistrates, required by 5 & 6 Wm. 4, c. 50, s. 20, were taken.

Two indictments,—the substance of which appears in the judgment,—were preferred against the corporation of Poole, as the

urban sanitary authority of the district, for the non-repair of two highways within the borough, viz. Oakdale Road and Wareham Road. The indictments were removed by certiorari, and tried before Mathew, J., at the Dorchester Spring Assizes, 1887, when verdicts were found for the Crown.

Rules nisi were afterwards obtained for a new trial on the grounds of misdirection, (1) in telling the jury that the defendants as urban sanitary authority were indictable for the non-repair of a public road within their district, (2) in telling the jury that the defendants were liable to be convicted under these indictments, although such indictments charged a common-law and not a statutable liability, (3) in omitting to tell the jury that the provisions of the General Inclosure Act, 41 Geo. 3, c. 109, s. 9, had not been complied with, and that the verdicts were against the weight of the evidence; or for judgment non obstante verdicto on the ground that the verdicts did not shew, nor did the evidence at the trial disclose, any liability on the part of the defendants.

June 13, 14. *Lock*, (*Charles, Q.C.*, with him,) shewed cause. The "powers, authorities, duties, and liabilities" of surveyors of highways being cast upon the urban sanitary authority by s. 144 of the Public Health Act, 1855 (38 & 39 Vict. c. 55), they were bound to keep in repair all the highways within their district which were formerly repairable by the inhabitants at large, and were liable to be indicted for a breach or neglect of that statutable duty: 2 Inst. 700; *Rex* v. *St. George, Hanover Square* (1); *Rex* v. *St. Giles, Cambridge.* (2)

J. Alderson Foote, in support of the rule. As to the form of the indictment, though it may be that the mere omission of the words "contra formam statuti" would not be fatal, yet the indictment ought to shew that a statutory obligation is relied on, and how that obligation arose. But, whatever the form of the indictment had been, it is submitted that it would not have lain against these defendants. The liabilities of the urban sanitary authority with respect to highways depend upon the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 144, 149. By s. 144

(1) 3 Camp. 222. (2) 5 M. & S. 260.

1887

THE QUEEN v. MAYOR, &c. OF POOLE.

there are imposed upon it the duties and liabilities of the old surveyors of highways, and also the duties and liabilities which are by the Highway Act, 1835, and its amending Acts, vested in and imposed upon the inhabitants of the parish in vestry assembled. Neither of these sets of liabilities includes the liability to indictment. The surveyor was never indictable; nor could he be sued for neglect: *Young* v. *Davis* (1); and, though the inhabitants of the parish are and remain indictable (*R.* v. *St. George's, Hanover Square* (2)) for the non-repair of highways, this is a common-law liability, and not one created by the Highway Act, 1835, nor imposed upon the inhabitants "in vestry assembled." Substantially the same liabilities and duties were transferred from the surveyors to vestries by the Metropolis Local Management Act (18 & 19 Vict. c. 120), and it has been held that such vestries are not liable to actions for non-feasance: *Parsons* v. *St. Matthew, Bethnal Green* (3): the same principle being applied to the analogous cases of local boards of health: *Gibson* v. *Mayor of Preston.* (4) If these bodies had been liable to indictment for non-feasance, it could never have been held that an action would not lie at the suit of an individual who had sustained special damage. The prosecution rely here upon the direction to repair in s. 149 of the Public Health Act: but the duty of repairing was imposed upon the surveyor in equally clear language by the Highway Act, 1835, and upon the Metropolitan vestries by 18 & 19 Vict. c. 120.

[LORD COLERIDGE, C.J. What procedure do you say is available to compel the performance of the statutory duty?]

Either summary proceedings for a penalty under s. 20 of the Highway Act, 1835, or by application to justices under ss. 94 and 95 of the same statute. There is, however, no statutory authority to justify this application to an urban sanitary authority of the old common-law indictment against the inhabitants of the parish.

[He also cited *Loughborough Highway Board* v. *Curzon* (5); *Hartnall* v. *Ryde Commissioners* (6); *Ohrby* v. *Ryde Commis-*

(1) 2 H. & C. 197.
(2) 3 Camp. 222.
(3) Law Rep. 3 C. P. 56.
(4) Law Rep. 5 Q. B. 218.
(5) 16 Q. B. D. 565; 17 Q. B. D. 344.
(6) 4 B. & S. 361; 33 L. J. (Q.B.) 39.

sioners (1); *Kent* v. *Worthing Local Board* (2); *Smith* v. *West Derby Local Board* (3); *Moore* v. *Lambeth Waterworks Co.* (4)]

The argument on a third point, arising under the Inclosure Act (41 Geo. 3, c. 109, s. 9,) is rendered immaterial by the judgment.

Cur. adv. vult.

July 6, 1887. The judgment of the Court (Lord Coleridge, C.J., and Denman, J.), was delivered by

LORD COLERIDGE, C.J. These were two rules calling upon the prosecutors of two indictments to shew cause why the verdicts for the Crown should not be set aside and a new trial had, on the ground of misdirection and that the verdict was against the weight of evidence, and for judgment non obstante veredicto.

The indictments, having been removed by certiorari, were tried by Mathew, J., and a special jury, at the Dorchester Assizes.

The indictments alleged respectively that two highways were in decay, "and that the mayor, aldermen, and burgesses of the town and county of the town and borough of Poole, acting by the council as the sanitary authority for the urban sanitary district of the said town and county and district, ought to repair and amend the said common highway, being in decay as aforesaid, when and so often as it shall be necessary."

There was no allegation in the indictment to shew how the defendants were liable; nor any statement as to the neglect alleged being against the form of the statute or statutes. The learned judge at the trial intimated his willingness to make any amendment within his powers.

As regards the omission of the words "against the form of the statute," it is laid down in Hawkins (5), that, "if an offence indicted be only prohibited by statute, and not by common law, and the indictment do not conclude 'contrà formam statuti,' it is wholly insufficient, and no judgment can be given upon it." This appears to have been decided in several cases; and we think it is applicable to a case like the present, where a criminal neglect

(1) 5 B. & S. 743.
(2) 10 Q. B. D. 118.
(3) 38 L. T. (N.S.) 716.
(4) 17 Q. B. D. 462, 473.
(5) Pleas of the Crown, Vol. iv., Indictment, s. 116.

1887

THE QUEEN v. MAYOR, &c. OF POOLE.

Lord Coleridge, C.J.

of duty is charged against a corporation, who in the absence of a statute would clearly not be persons liable to be indicted for the non-repair of a highway.

So far from containing anything to cure this defect in the indictment, we find that the statutes relating to indictments are so worded as to exclude any power to amend this particular defect, or to authorize us to treat it as immaterial. The power of amendment of indictments is very limited. The 9 Geo. 4, c. 15, was confined to the case of variances between the record and any matter *in writing or print* produced in evidence in misdemeanors. The 11 & 12 Vict. c. 46 only carried the power further by applying the same provision to all criminal trials. The 14 & 15 Vict. c. 100, s. 1, enumerates the cases in which amendment is to be allowed. They are numerous; but there is no power given to amend by inserting the words "against the form of the statute" in cases where a statutable misdemeanor is proved and the words have been omitted. The 24th section of that same Act seems conclusive against any such power; for, it deals with the very words in a manner wholly inconsistent with any such intention. Again referring to Hawkins (1), we find this passage: "If there be more than one statute concerning the same offence, and the first of them was never discontinued, and the latter only continue the power without making any addition to it, or only qualify the method of proceeding upon it, without altering the substance of its provision, it seems agreed that it is safer in an indictment on any such statute to conclude 'contrà formam statuti;' and it hath been holden that a conclusion 'contrà formam statutorum' will in such cases vitiate the prosecution."

With this before him, in a statute intended to get rid of all over-technical objections to indictments in kindred respects, the draftsman of s. 24 of 14 & 15 Vict. c. 100 has provided as follows:—"No indictment for any offence shall be held insufficient" (amongst other things) "for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes,' or vice versa." We think it impossible to read this clause without being convinced that the framer of the enactment deliberately abstained from enacting that in a case where the liability

(1) Vol. iv. § 117.

to do an act was imposed by statute, and an indictment was preferred for the violation of a duty so imposed, it should be henceforth competent to the prosecutor to treat the case exactly in the same way in which it would be treated if the neglect alleged were that of a duty imposed by the common law.

Then arises the question whether this is a formal defect apparent on the face of the indictment or an objection which cannot be taken after the jury are sworn, according to s. 25 of the same Act. The very authorities referred to in the passages in Hawkins above cited were to the effect that the omission to conclude "contrà formam statuti" was a fatal objection in arrest of judgment. We do not think that the objection can be considered a formal one any more than the omission of the word "feloniously" would be upon a charge of arson, or "scienter" in a case of receiving, which was held to be incurable after verdict, by Lord Campbell and the Court of Criminal Appeal, in *Reg.* v. *Larkin* (1) only two years after the passing of the statute. The indictment fails to give the defendants notice of the *kind* of liability which it is intended to fix them with. The case of *Reg.* v. *Sill* (2) and *Reg* v. *Larkin* (1) are illustrations of the distinction between mere formal defects and defects of which advantage may be taken after verdict. We think s. 25 of the Act must be construed with reasonable reference to s. 24, and that for the reasons already given it would be contrary to the intention of the Act to hold that either section was intended to repeal the law as laid down in Hawkins. We therefore think that the defendants are entitled to judgment non obstante veredicto on this ground.

We are confirmed in our opinion that the above objection is fatal, by the consideration that the questions raised by Mr. Foote as to the liability of the defendants are questions of very great nicety, and that, if the defendants are liable under the statutes to an indictment at all, it is not unreasonable to require that the circumstances creating their liability should be shewn on the face of the indictment in such a way that the Court might see whether the indictment does or does not shew a legal liability; or, at least, that the indictment should inform the defendants

(1) 23 L. J. (M.C.) 125. (2) 22 L. J. (M.C.) 41.

1887

THE QUEEN v. MAYOR, &c. OF POOLE.

Lord Coleridge, C.J.

whether they are being prosecuted for a common-law or a statutory offence.

But, even assuming that in this case the indictment is sufficient without amendment, or, if not, that an amendment could be and was made, we are of opinion that the defendants are entitled to judgment. The liability of the defendants as urban sanitary authority is created by s. 144 of the 38 & 39 Vict. c. 55. The first branch of that section makes the urban sanitary authority subject to all the liabilities of surveyors of highways under the law for the time being in force. No authority has been cited to shew that a surveyor of highways (against whom it was decided long ago, in *Young* v. *Davis* (1), that an action will not lie) was ever liable to be indicted for the non-repair of a highway. The only persons liable to be indicted were the inhabitants of the parish or the other person or persons liable to bear the burden of repair: see *Loughborough Highway Board* v. *Curzon*. (2) The case of *Gibson* v. *Mayor of Preston* (3), in which all the authorities were reviewed, is entirely to this effect, and is recognized, though distinguished, in *Kent* v. *Worthing Local Board* (4), the only case in which a local board has been held liable to an action for an omission of any of the duties in relation to highways imposed upon them by the Public Health Act, 1875. That case, however, was decided wholly upon the difference or supposed difference between the mere neglect to repair highways and what the Court held to be the *doing* of an act in such a way as to become a nuisance,—a distinction which must be considered doubtful after the case of *Moore* v. *Lambeth Waterworks Co.* (5), in the Court of Appeal, in which it is spoken of as the only case in which a local board had been held liable for an act of omission or a mere nonfeasance, and said to be a case only to be supported on grounds quite inapplicable to a case of mere non-repair of a highway.

One conclusive reason for holding that a surveyor could not be indicted for the non-repair of a highway is, that, by the law existing as long as surveyors were the only persons appointed for the purpose of attending to such matters on behalf of a parish,—

(1) 2 H. & C. 197.
(2) 16 Q. B. D. 565; 17 Q. B. D. (C.A.) 344.
(3) Law Rep. 5 Q. B. 218.
(4) 10 Q. B. D. 118.
(5) 17 Q. B. D. 462.

at all events since 5 & 6 Wm. 4,—the surveyor could be punished by specific methods provided by statute; so that it sufficiently appeared from the statute regulating their conduct that it was the intention of the legislature to provide a different punishment for disobedience to the statute from a prosecution by indictment. Sect. 20 of 5 & 6 Wm. 4, c. 50, provides that for *any* neglect of duty for which no particular penalty is by that Act imposed, the surveyor shall forfeit 5*l*. Sect. 144 of the Public Health Act, 1875, also provides that the urban sanitary authority shall be subject to all the duties and liabilities which by the Highway Act, 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled. But the liability to an indictment at common law cannot be contended to be a liability which was imposed upon the inhabitants in vestry assembled. No assembly of the vestry was required to constitute such liability; nor was it a liability imposed by the Highway Act or any other Act. It existed wholly independently of the Acts, though the Acts contained certain provisions limiting the cases in which and the terms upon which indictments might be successfully preferred in accordance with the provisions of the Acts. There is nothing, as far as we can see, in the 144th section of the Public Health Act, 1875, nor in any of the existing Acts, to make the urban sanitary authority liable to a common-law indictment for neglecting those duties which they have imposed upon them either as surveyors of the highways or as inhabitants in vestry assembled. If their liability is to be established in the latter capacity, we think it could only be upon an indictment preferred according to the provisions of 5 & 6 Wm. 4, c. 50, after the preliminary steps thereby required, and not as persons liable at common law to be indicted as though they were the persons liable for repair in the same sense in which the parish or other persons liable ratione tenuræ are liable.

Mr. Foote relied upon another point, viz. that the roads in question had not been set out under the Inclosure Acts. But this was a point, as we understood, not raised at the trial,—at all events not so insisted upon as that we should be justified in setting aside the verdict. It is a matter which might very easily have been taken as proved, in the absence of special attention

1887

THE QUEEN v. MAYOR, &c. OF POOLE.

Lord Coleridge, C J.

being called to it. But, for the reasons given above, we are of opinion that the defendants are entitled to judgment non obstante veredicto, the indictments not alleging a case of liability in the defendants upon which the jury were warranted in finding any verdict against them, and the statute not creating any such liability, even if the indictment had alleged all the circumstances upon which the prosecution relied.

Judgment accordingly.

Solicitors for prosecution: *Brownlow & Howe, for Edward Seymour Clark, Wareham.*

Solicitors for defendants: *Prior, Church, & Adams, for H. W. Dickinson, Poole.*

[See post, page 683.]

J. S.

July 1.

IN THE MATTER OF DUTY ON THE ESTATE OF THE INSTITUTION OF CIVIL ENGINEERS.

Revenue—Bodies corporate or unincorporate—Duty—Property appropriated for the Promotion of Education or Science, what is—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-s.* 3.

By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied "for the promotion of education, literature, science, or the fine arts":—

Held, that the property of the Institution of Civil Engineers was not entitled to the benefit of the exemption, because it was property appropriated and applied, not for the promotion of general education or science, but for the promotion of a particular branch of knowledge in order to enable the members of the institution to practise with more success the profession of a civil engineer.

WRIT of summons in the Queen's Bench Division commanding James Forrest, the secretary of the Institution of Civil Engineers, within fourteen days to pay to the Commissioners of Inland Revenue certain duties assessed by them upon the property of the institution in pursuance of the Customs and Inland Revenue Act, 1885; or within the same time to appear in the Queen's Bench Division and shew cause why default was made in paying the same duties. An appearance was duly entered to the writ.

The following material facts appeared from the affidavit made by the secretary, from the charter of the institution and the

by-laws and regulations made under it, and the last report of the council, dated May 25, 1886, all of which documents were made exhibits to the affidavit.

The Institution of Civil Engineers was incorporated by Royal Charter, dated June 3, 1828. The nature and objects of the institution, as defined in the charter, were: "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states, both for external and internal trade, as applied to the construction of roads, bridges, aqueducts, canals, river navigation and docks for internal intercourse and exchange, and in the construction of ports, harbours, moles, breakwaters, and lighthouses, and in the art of navigation by artificial power for the purposes of commerce, and in the construction and adaption of machinery, and in the drainage of cities and towns."

In the last report of the council it is pointed out that, since the charter was drawn, the range of practice of the profession has become much enlarged, and after enumerating a great number of classes of works with which practitioners in the art may now have to do, the report proceeds: "This is a comprehensive, but by no means a complete catalogue, and if an estimate is attempted to be formed of the work done under it in the last century, and of the effect this work has had on the development of trade and commerce, on finance, and indeed on every possible aspect of human interest, it must be admitted that the profession of civil engineering has become a truly great power."

The whole property of the institution is and always has been exclusively devoted to the furtherance of these objects.

Section II. of the by-laws now in force has respect to the constitution of the institution, and provides that it shall consist of corporate members and associates, and honorary members, and that the institution may also have attached to it associates who are not entitled to the privileges of corporate membership, and students.

In order to qualify a candidate for election as a corporate

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

member, he shall have been regularly educated as a civil engineer according to the usual routine of pupilage, and shall have had subsequent employment for at least five years, and shall be actually engaged at the time of his application for election in responsible situations as resident engineer, or otherwise, in some of the branches defined by the charter as constituting the profession of a civil engineer, or he shall have practised on his own account in the profession of a civil engineer for at least five years, and shall have acquired a considerable degree of eminence in the same.

A candidate for election as an associate entitled to the privileges of corporate membership shall have been regularly educated as a civil engineer, and shall be actually engaged, at the time of his application for election, in the design or in the construction of such works as are comprised within the profession of a civil engineer as defined by the charter; or he shall satisfy the council that he has had a sufficient training, and that he has been engaged for at least five years, and that he is actually engaged at the time of his application for election, in the design or in the construction of such works as are comprised within the profession of a civil engineer as defined by the charter.

Candidates for election into the class of associates not entitled to the privilege of corporate membership shall be persons who are not civil engineers by profession, but whose pursuits constitute branches of engineering, or who by their connection with science, or the arts, or otherwise, are qualified to concur with civil engineers in the advancement of professional knowledge.

Honorary members shall be either distinguished individuals who from their position are enabled to render assistance in the prosecution of public works, or persons eminent for science and experience in pursuits connected with the profession of a civil engineer, but who are not engaged in the practice of that profession in the United Kingdom or its dependencies. Students shall be persons not under eighteen years of age who are, or have been, pupils of corporate members of the institution, and who have the object or intention of becoming engaged in the design or in the construction of such works as are comprised within the profession of a civil engineer as defined by the charter; and such persons may

continue students until they attain the age of twenty-six years, but not longer.

By section IV. students may be admitted by the council on the recommendation of the corporate member under whom they are, or have been, pupils; they are to pay a yearly subscription, and when their first year's subscription has been paid, they may attend, but not vote at, ordinary meetings; they may compete for the premiums and prizes arising out of any funds devoted by the institution, or by any person or persons, for premiums or prizes for students; and the council may accord to them other privileges, subject to such terms, regulations, and restrictions as the council shall from time to time prescribe.

The property of the institution consists of certain premises, being No. 25, and part of No. 24, Great George Street, Westminster, which are partly freehold and partly leasehold, with the furniture, books, drawings, and appliances therein contained, and of certain investments in Government, railway, and other securities, particulars of which are given in the report. That property is entirely the product, either of voluntary donations or bequests from members of the institution, or arises from the savings made by the institution out of the annual subscription of members, or from admission fees of members, or life compositions in lieu of annual subscriptions. In addition to such property the institution has a considerable annual income derived from the annual subscriptions of corporate members, associates, and students; but no part of such income arises from the sale of publications to the public, nor from any charge for the use of the premises for any purpose whatever, although such use is readily accorded, in pursuance of powers contained in the by-laws, gratuitously to societies with cognate objects. As appears from reference to the report and the abstract of receipts and expenditure appended thereto, such property and income is partly held and applied by the institution upon specific trusts, and partly forms their general corporate property, and is applied by them for the general purposes of the society.

The manner in which the institution carries out the objects for which it was established is as follows:—The premises No. 25, and part of No. 24, Great George Street, are occupied by the institu-

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

tion. Besides the usual office accommodation, they contain a reading-room and a large room for the purposes of meeting and discussion, and a library of upwards of 21,000 volumes of scientific and technical works, and a collection of drawings relating to matters of interest and instruction to civil engineers. During each yearly session of the institution, the council invite contributions from their members in the shape of papers or treatises upon engineering subjects, or any scientific matter which is capable of application for the purposes of civil engineering. A certain number of such papers selected by the council for merit and interest are read at the ordinary meetings of the institution, held for the purpose upon every Tuesday evening (with certain exceptions) during the session. Such reading is followed by a discussion, to which, in addition to the members of all classes, persons not members but competent to advance the knowledge of the subject under consideration are invited to take part, and the papers themselves, and the reports of the discussions upon them, along with other selected original papers, and abstracts of papers in foreign transactions and periodicals, are printed in the minutes of proceedings of the institution, which are circulated gratuitously amongst the corporate members, associates, and the students of the institution, and the cost of which forms by far the largest item in the general expenditure of the institution. The subjects of papers so read and discussed during the session of the institution ending in May, 1886, are set out in the report and are there stated to represent "the varied character and the advanced position of the engineering of the present day." For some of the papers so contributed, which the council deem of special merit, prizes and premiums of various values are awarded, particulars of which appear in the report. These prizes and premiums are all provided out of special trust funds held by the institution for the purpose. Any surplus of such trust fund is invested by the institution so as to increase the ultimate value of the specific bequest or donation from which such surpluses respectively arise.

The library of the institution is open to all corporate members, associates, and students of the institution, and is much consulted by them. The students of the institution hold meetings for the

188

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

reading of papers and discussion, which are confined to their own grade, but are presided over by a corporate member.

The premises occupied by the institution are occasionally lent gratuitously for the meetings of kindred societies, such as the Institution of Mechanical Engineers, the Society of Telegraph Engineers, &c. Among other bodies to whom such gratuitous use is allowed is "The Benevolent Fund of the Institution of Civil Engineers," the object of which is to afford assistance to necessitous members and associates of the institution, but its affairs are administered by a separate body, and it has a totally distinct organization.

The purposes and matters hereinbefore mentioned, as explained and amplified by the charter, by-laws, report and abstract of receipts and expenditure, together with the ordinary expenses of rent, maintenance, &c., of buildings, and the salaries of the secretary and other officials and servants of the institution, are the only purposes and matters whatever to which any part of the income of the property of the institution is applied. By section XV. of the by-laws, "the property and effects of the institution of what kind soever are vested in the corporate members for the time being, for the use of the body politic and corporate solely, in furtherance of the public and scientific objects contemplated in the charter. Under no pretence whatever shall such property and effects, or the income or revenue of the institution, derived from voluntary contributions or otherwise howsoever, be applied in making any dividend, gift, division, or bonus unto or between any of the corporate members, and the same is hereby expressly prohibited, in conformity with the fundamental law and invariable practice of the institution, as acted upon from its first establishment; and therefore no proposition in contravention thereof shall be entertained by the council, or by any meeting, whether general or special, of the corporate members of the institution."

The members of the institution have no exclusive right to practise the profession of a civil engineer, nor has the institution itself any power to prevent any person whatsoever from practising such profession, nor to impose any examinations, tests, or regulations whatever upon any person who desires to practise such

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

profession, or to exercise any control or discipline whatever over the members of the profession as such. It has only the ordinary power of every association to expel from its body any person whom the members think unfit to remain within it; and even such expulsion would not prevent the expelled member from continuing the practice of a civil engineer if he thought fit.

The roll of the institution set out in the report shewed that in 1886 the aggregate number of honorary members, members, associate members, associates, and students, was 5100.

The Commissioners of Inland Revenue assessed the duty upon the property of the institution under s. 11 of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), which enacts: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted that there shall be levied and paid to Her Majesty in respect of all rent and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the 5th day of April, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of 5*l.* per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property. Subject to exemption from such duty in favour of property of the descriptions following, that is to say:—

(3.) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts:

(6.) Property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding."

The institution has rendered no account to the Commissioners,

nor have the Commissioners appointed any person to take an account under s. 17 of the above Act.

Sir E. Clarke, S.G. (*Sir R. E. Webster, A.G.*, and *A. V. Dicey*, with him), for the Commissioners of Inland Revenue. The Institution of Civil Engineers is liable to the duty imposed by the Commissioners under s. 11 of the Customs and Inland Revenue Act, 1885. It is for the corporate body to shew that their property, or the income or profits thereof, is or are legally appropriated and applied "for the promotion of education, literature, science, or the fine arts," within the meaning of the exemption in sub-s. 3 of s. 11. Sub-s. 6 does not apply to exempt the Institution, because the decision in *Re the Duty on New University Club* (1) with respect to what are voluntary contributions within the meaning of that sub-section, applies a fortiori to this case. Upon the facts appearing from the secretary's affidavit, and the exhibits, this is not an institution whose property, or the income or profits thereof, is legally appropriated and applied for the promotion of education, literature, science, or the fine arts, within the true meaning of sub-s. 3. It is an association of persons for their own purposes and advantage in the pursuit of their profession. The words of the exemption contemplate property belonging to a body existing for the promotion of education, literature, science, or the fine arts generally. The promotion of the general knowledge and refinement of society is meant. This case is covered in principle by the decision in *Reg.* v. *Institution of Civil Engineers.* (2) The question there was whether the Institution of Civil Engineers was exempted from payment of poor-rates under s. 1 of 6 & 7 Vict. c. 36 (which exempts from rateability societies instituted "exclusively for the purposes of science, literature, and the fine arts"), and the Court held that it was not, because the object was not to advance the knowledge of science generally, but to advance a particular branch of knowledge so as to enable the members of a particular profession to practise that profession with more success. The nature of this institution is accurately described in the judgments of the Court, which are relied upon by the Crown in the present

(1) 18 Q. B. D. 720. (2) 5 Q. B. D. 48.

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

case. *The Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (1) was a decision of the Court of Session in Scotland upon the same section as the Court have to construe in the present case. It was there held that the property of the Society of Writers to the Signet was not "legally appropriated and applied" to the promotion of education within the meaning of sub-s. 3. The Court said that the true meaning of the exemption was that the property should be, if not exclusively, yet mainly and chiefly, devoted to the purposes of education, literature, science, or the fine arts, and that the property of the society did not satisfy that description, because people became writers to the signet, not for the purpose of studying literature or the fine arts, or of being educated, but for the purpose of making pecuniary gain by a profession. Applying the same test to the Institution of Civil Engineers, it is obvious that people become members, not in order to further the general promotion of education or science, but to enable themselves to make pecuniary gains by the exercise of the profession of a civil engineer. The exemption, therefore, does not apply to this institution, and the Crown is entitled to judgment.

A. Charles, Q.C. (*Sir H. Davey, Q.C.*, and *F. R. Y. Radcliffe*, with him), for the Institution of Civil Engineers. This institution is within the words of the exemption in sub-s. 3. It is an educating body, and there is nothing in the statute to limit the education to general education. The acquisition of one great department of human knowledge is properly termed "education," and the general object of the body, which is stated in the charter as "the general advancement of mechanical science," is of as much public importance as any of the objects for which universities exist. In *Reg.* v. *Institution of Civil Engineers* (2) all that the Court decided was that this institution did not exist "exclusively" for the promotion of science, but that it existed also for the promotion of education in the knowledge of the art or profession of the members comprising it. The word "exclusively" is omitted in the Act of 1885, and the exemption is made to apply for the first time to property appropriated for the promotion of "education."

(1) 14 Rett. 34. (2) 5 Q. B. D. 48.

That case is therefore distinguishable from this. So is the Scotch case upon which the Crown rely, because it was shewn there that no one could become a writer to the signet without joining the society, and going through the course prescribed by it. In that case it also appeared the society endowed a professor's chair for teaching conveyancing. That endowment was in respect of a very special class of education for the benefit of persons desiring to practise conveyancing, but the Court said that the property so appropriated would come within the exemption in sub-s. 3. That part of the judgment shews that the Court did not intend to limit the exemption in the way here suggested. It is a question of fact whether this particular institution exists for the promotion of education or science, and taking into consideration all the facts before the Court, it is submitted that it does exist for those objects. If one of the tests to be applied is whether the state or the public at large gains an advantage from the exempted body corresponding to the exemption, this institution will stand that test. Its objects are at least as valuable and important to the state and the public as those in respect of which the universities of Oxford and Cambridge have been endowed.

Sir E. Clarke, S.G., in reply. The distinction taken between *Reg.* v. *Institution of Civil Engineers* (1) and this case is not important. It makes no substantial difference that the word "exclusively" does not occur in sub-s. 3, the exemption being—as was said in the Scotch case—meant to apply only to corporate bodies existing, if not exclusively, yet chiefly and mainly for the promotion of education, &c. The chair endowed by the Society of Writers of the Signet in the Scotch case was a chair at the university, and all the members of the university were entitled to the advantages it offered. Lord Shand's observations with respect to writers to the signet apply equally here. The advantages of the Institution of Civil Engineers are carefully confined to members of that body. They are advantages wholly enjoyed by one class of professional men. Their reports are not sent, nor are their prizes open (except in one or two instances of trust funds which have not been assessed to the duty in this case) to the public, who gain no advantage whatever from the institution.

(1) 5 Q. B. D. 48.

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

LORD COLERIDGE, C.J. I am of opinion that the Crown is entitled to succeed in this case. The funds of the institution would clearly come within the general words of s. 11 of the Customs and Inland Revenue Act, 1885, and so would be subject to the duty sought to be imposed, unless the exemption in sub-s. 3 applied. That which is sought to be exempted is substantially the whole property, or nearly the whole property, of the institution, and the ground upon which the exemption is claimed is that this is property which is, and the income and profits of which are, "legally appropriated and applied for the promotion of education, literature, science, or the fine arts," within the meaning of sub-s. 3. Now the collocation of the words in that sub-section may throw some light upon the meaning of the particular words upon which the claim for exemption is founded. Do the words "for the promotion of education, literature, science, or the fine arts," mean the teaching of a particular thing connected with education, or literature, or science, or the fine arts? I think not. If that were the meaning, I think that the application of the exemption would be carried to almost any conceivable institution which taught anything conducing to education, to literature, to science, or to the fine arts; and it is very difficult to imagine, if such a definition were adopted, what institution would be excluded. Nearly all lawful institutions teach something or other which may be advantageous to education, literature, science, or the fine arts. An institution for teaching people to make shoes, for instance, would be within the exemption, because it is possible that the making of shoes extremely well would in a remote way aid the purposes of some portion of education, or of science, or have some connection with assisting the laws of nature, or construction, and so forth. I think, therefore, that the words of the exemption must receive a more reasonable construction. I think that those words must be construed to mean general education, general literature, science considered as a branch of human knowledge, and the fine arts as extending to all those matters, great and small, with which the fine arts are connected. That being my view of the meaning, does the Institution of Civil Engineers come within it? I do not for a moment doubt that it is a most excellent and valuable body, nor that it

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Lord Coleridge, C.J.

contributes a great deal to the general intelligence and advancement of the country, but it is instituted and carried on, not at all for the pure advancement of the laws of science, but for the promotion of such a study of the laws of science as shall, in the words of the charter, be conducive to "the general advancement of mechanical science, and more particularly for promoting that species of knowledge which constitutes the profession of a civil engineer." However great and noble a profession, it is a profession prosecuted like all others for the purposes of honourable gain. It exists for the purpose of promoting such knowledge as will make civil engineers better civil engineers. I think that it is not an institution for the promotion of general education, or of general literature, or of general science, or of the fine arts generally, but for the promotion of a particular branch of knowledge for the purpose of increasing the intelligence and cultivation of the particular profession which deals with one branch of mechanical knowledge. I think, therefore, that this institution is not brought within the words of the exemption contained in sub-s. 3 of s. 11. I should have come to that conclusion without very much difficulty had there been no authority on the subject, but there is authority which seems to me to conclude this case in principle. I quite agree that the case of *Reg.* v. *Institution of Civil Engineers* (1) is not exactly in point. The statute which had to be construed in that case contained the word "exclusively," which is not to be found in s. 11 of the Act of 1885. But I think it makes very little practical difference whether you say that a thing is "exclusively" for the promotion of education, or (which is, I think, the true meaning of the words in s. 11) that it is mainly and chiefly for the promotion of education, literature, science, and the fine arts. The difference in the wording of the statute in that case and in the present does not, to my mind, make any substantial distinction between the principle which was applied there and the principle which ought to be applied here. The reasons for the decision in that case, and the grounds upon which my learned brothers based their decision, seem to me to cover this case. I also think that the decision of the very eminent judges in the Scotch case proceeded on the same principle. The property of

(1) 5 Q. B. D. 48.

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Lord Coleridge, C.J.

the Society of Writers to the Signet was there proposed to be assessed. Objection: that the society was for the purposes of education. Answer: that it was not for purposes of education, but for objects which were happily expressed by Lord Shand as follows:—"The maintenance of a body of professional men with recognized privileges—privileges which are of importance, and which were perhaps some years ago more extensive than they are now, and the object which the society has in view is not education, or the promotion of education, literature, or science, but that he shall become a member of the society in order to practise his profession as a writer to the signet." Now I do not forget the distinction which undoubtedly exists between that case and this. I agree with Lord Shand that the object of the Society of Writers to the Signet is not to promote the study of the law, or the understanding of the theory of the general law, but to promote the wholesome practise of an honourable profession; and the members of the society join it in order that they may more fitly and adequately practise that profession. Here the Institution of Civil Engineers is undoubtedly, as I have said, a teaching body, and persons become members or pupils, not for the purpose of the advancement of education, or of literature, or of science, or of the fine arts, but in order that they may obtain certain technical and valuable knowledge of mechanics for the purpose of practising with more success the profession of a civil engineer. The distinction between the two cases is, that no one in Scotland can become a writer to the signet without joining the society and going through the course which the society prescribes; but if a man wishes to become a civil engineer it is not necessary that he should join the Society of Civil Engineers. I do not think that this distinction makes any valid difference in the principle to be applied, and for obvious reasons: no man is bound to be a writer to the signet, or to adopt that as his profession; but if he chooses to adopt it as his profession, then in order to pursue it effectively he must join the society, and go through the prescribed course. No man is bound, even if he chooses to be a civil engineer, to join the Institution of Civil Engineers; but any man who wants most effectively and successfully to practise the profession of a civil engineer will join the institution and go

through the course of teaching which it provides. The distinction does not seem to me to go to the root of the matter, or to prevent the principle of the Scotch case applying here. I think, therefore, for the general reasons I have given, and upon the authority of the decided cases, that the Crown is entitled to succeed.

FIELD, J. This is a proceeding by way of writ of summons which charges that the Institution of Civil Engineers, a corporate body, have property in respect of which they are accountable to duty; that they have been assessed to that duty, and that they have not paid it. The body deny that they are accountable, and they claim the benefit of the exemption in s. 11, sub-s. 3, of the Customs and Inland Revenue Act, 1885. The question is whether they have brought themselves, by the statement of their officer, within that exemption. Now, that the Institution of Civil Engineers is most meritorious; that it confers very great benefits upon the country, no one can for a moment deny. On the other hand it is, of course, very important in construing this statute to see that all property which comes within its purview should bear its full share of the general burdens of the country. Now there is no doubt that the property of this institution comes within the general enactment; and it lies upon the institution to make good the proposition that their property is brought within the terms of the exemption. Have they succeeded in doing so? I think not. In order to exempt this corporate body from the duty they must be owners of property legally appropriated and applied for the promotion of education, literature, science, or the fine arts. It seems to me that the exemption is intended to some extent to be correlative with the public benefit derived from the corporate body—that is to say, that the statute did not contemplate the exemption of bodies conferring mere individual local benefits. In order to be entitled to the exemption the body must be owners of property which must be legally appropriated and applied for the promotion of education, &c. I think that the language I used in *Reg.* v. *Institution of Civil Engineers* (1) with respect to this same institution applies in the present case. It

(1) 5 Q. B. D. 48.

1887

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Field, J.

is true that the statute there contained the word "exclusively," but I cannot see that the distinction makes a substantial difference. We must look at the main object and purpose of the body claiming the exemption, and at the main object and purpose to which its property is appropriated and applied, in order to determine whether the body is entitled to the exemption. It is true also that the word "education" has been introduced into the Act of 1885; but I agree with my Lord that, looking at the collocation and position of the words in sub-s. 3, the same conclusion ought to be arrived at as in *Reg.* v. *Institution of Civil Engineers.* (1) I expressed my views fully in that case, and I think that those views apply here. I agree that the Crown is entitled to judgment.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for the Institution of Civil Engineers: *Radcliffe, Cator, & Martineau.*

W. A.

July 2.

ST. ANDREW'S HOSPITAL, NORTHAMPTON, APPELLANTS; SHEARSMITH (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax Acts, Sched. D.—Exemption—Payments "applied to Charitable Purposes only," what are—5 & 6 *Vict. c.* 35, *s.* 105.

The managing committee of a hospital, founded by voluntary contribution for the care and treatment of insane persons, made large yearly profits by receiving wealthy patients, who were charged sums greatly exceeding the actual cost of their maintenance and treatment. The committee applied a portion of those profits in aid of the maintenance and treatment of poorer patients, who were themselves unable to pay the actual cost thereof, and the remainder in executing works which were pressed upon the committee by the Commissioners in Lunacy, and were deemed necessary to bring the hospital into a proper state of efficiency:—

Held, that the profits were not, by reason of such application of them to the purposes of the hospital, payments "applied to charitable purposes only" within the meaning of s. 105 of 5 & 6 Vict. c. 35, so as to exempt the institution from payment of income tax under Sched. D.

CASE stated under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the Special Commissioners of Income Tax, held at Northampton, in April, 1884, for the purpose of hearing

(1) 5 Q. B. D. 48.

1887

ST. ANDREW'S HOSPITAL, NORTHAMPTON v. SHEARSMITH.

appeals, the St. Andrew's Hospital, Northampton, by their secretary appealed against an assessment of 7000*l.* made under Schedule D. for the year ending April 5, 1884, by the district commissioners in respect of property derived from patients.

The authorities of the hospital denied their liability on the ground that the hospital was a charity, and therefore exempt from payment of income tax.

The hospital was founded by voluntary contribution, raised principally in the county of Northampton, and was opened in the year 1838. It was managed by a committee of subscribers whose services are gratuitous.

The object of the hospital is the care and treatment of persons suffering from mental diseases, the full designation being "St. Andrew's Hospital for Mental Diseases."

The committee for many years past have had to spend large sums of money in bringing an extensive building, erected nearly fifty years since, up to the requirements of the present time; the improvements made having been mostly works pressed upon the attention of the committee by the Commissioners in Lunacy for a long time before there were funds available to execute them, and being improvements which were deemed necessary in order to bring the hospital into a proper state of efficiency.

The only fund available for this expenditure is the ordinary revenue of the hospital, as shewn by the balance sheets given in the annual reports, and such revenue is made up by occasional legacies and donations and the contributions of patients' friends.

From the printed accounts of the institution it is found that the profits, not including donations, amounted in the average of the three years, 1880, 1881, and 1882, to over 8000*l.*, from which has to be deducted the annual value assessed under Schedule A. Until the buildings referred to in the annual reports were completed, the committee were compelled to limit the number of charity patients, but that this class is largely helped is shewn by the return of such cases given in each report.

From the annual reports of the committee it appeared that wealthy patients were received for care and treatment in the hospital, and that sums greatly in excess of the actual cost of their maintenance and treatment were charged. The excess was

1887

ST. ANDREW'S HOSPITAL, NORTHAMPTON v. SHEARSMITH.

applied to paying for the cost of the maintenance of poorer patients, who were received into the hospital at various rates of charge. Of these patients none paid for their maintenance and treatment at rates which were remunerative.

The Special Commissioners of Income Tax were of opinion that the hospital was not entirely a charitable institution, and was therefore liable to payment of income tax. They therefore confirmed the assessment of the district commissioners, and stated this case at the request of the secretary of the hospital.

Sir H. James, Q.C. (*W. Graham*, with him), for the appellants. The facts stated in the case shew that the sum of 7000*l.*, representing the excess of receipts over expenditure, is "applied to charitable purposes only" by the committee of the hospital, and therefore the institution is within the exemption of s. 105 of 5 & 6 Vict. c. 35 (1). The money representing that excess is not the less applied to charitable purposes, because it is taken from the richer patients and charitably applied in aid of the poorer; and so much of the same excess as is expended in providing new buildings in which to receive patients is clearly devoted to charitable purposes. The committee do not carry on any trade or business such as is contemplated in Sched. D. All the expenditure is devoted to charitable purposes and cannot, under the trusts and the rules of the institution, be applied to any other purposes.

(1) By s. 105 of 5 & 6 Vict. c. 35, it is provided "that any corporation, fraternity, or society of persons, and any trustee, for charitable purposes only, shall be entitled to the same exemption in respect of any yearly interest, or other annual payment, chargeable under Sched. D of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such corporation, fraternity, or society of persons, and to any trustee, for charitable purposes only, in respect of any stock or dividend chargeable under Sched. C of this Act, and applied to the like purpose."

By s. 88 (Sched. C) (3) there is an exemption from income tax in respect of "the stock or dividends of any corporation, fraternity, or society of persons, or of any trust, established for charitable purposes only; or which according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only."

It is also submitted that no profits are made which can be assessed to the income tax. The case finds that the excess of receipts over expenditure, after paying for some of the poorer patients, is expended in altering buildings and making improvements in order to bring the hospital up to the requirements of the present day, and the necessity for those alterations and improvements has been pressed upon the committee by the Commissioners of Lunacy. The excess fund is, therefore, of necessity appropriated in making the hospital efficient as a charitable institution, and cannot properly be considered as profits made by the committee. That body would not make the profits were they not necessary in order to more effectually carry out the charitable objects of the hospital. It is conceded that generally if profits are made, and the persons having the control of them choose to devote them to charity, those profits are taxable.

Sir E. Clarke, S.G. (*Sir R. E. Webster, A.G.*, and *A. V. Dicey*, with him), for the respondent. There is a business carried on by the appellants, and there are profits derived from it which are liable to the income tax. By s. 100 of 5 & 6 Vict. c. 35, the tax under Sched. D is made to apply to all property or profits not comprised in, or specially exempted from, the other schedules. This is not an institution carried on for charitable purposes only within the exemption in s. 105. The fact that the profits when received are applied to charitable purposes is not the test of liability to taxation. That liability accrues when once profits are made. Further, the exemption in s. 105 does not apply here. The exemption is in respect of "any yearly interest, or other annual payment chargeable under Sched. D, in so far as the same shall be applied to charitable purposes only;" and the exemption is to be the same as is granted to corporations in respect of any stock or dividends chargeable under Sched. C, and applied to the like purpose. The exemption in Sched. C. is in respect of the stock or dividends of any corporation, which by trust or statute is applicable to charitable purposes only. No indication of any intention to exempt profits is to be found in either section; and the words in s. 105, "any yearly interest, or other annual payment," indicate that the income derived by a corporation from stock or dividends is meant.

1887

ST. ANDREW'S HOSPITAL, NORTHAMPTON v. SHEARSMITH.

[He was stopped by the Court.]

Sir H. James, Q.C., replied.

LORD COLERIDGE, C.J. In this case I have come to the clear conclusion that the respondent is entitled to judgment. Assuming that there is a profit made by carrying on the hospital, the question arises whether that profit is, or is not, assessable to the income tax. I am of opinion that it is. Primâ facie it is clearly assessable. Then does the exemption in s. 105 of 5 & 6 Vict. c. 35, apply to such profit in the hands of the committee? I think it does not apply. I will assume, but I assume it for the purposes of this judgment only, that this institution is a corporation for charitable purposes only. I will assume also that this profit is "yearly interest, or other annual payment," within s. 105, though I do not think it is. But I am of opinion that it clearly is not applied to charitable purposes only within the meaning of the exemption. It was ingeniously contended on behalf of the appellants that, although it could not be denied that there was an excess of receipts over expenditure amounting to 7000*l.* on an average of three years, yet the sum representing that excess could not be assessed because it was expended in making the hospital itself more fit for the purposes for which it was instituted. It was said that the Lunacy Commissioners having pressed that the equipments of the hospital should be improved, and various alterations and additions made in order to bring it up to the present standard, a considerable portion of the income or profits had been applied in carrying out the Lunacy Commissioners' recommendation: and it was argued that this was not a case of profits made to be disposed of at the will of the governing body of the hospital, but that it was a case in which that body were compelled by the recommendation of the Commissioners to make the profits with one hand for the purpose of expending those profits with the other hand in making the institution itself more fit for the purposes for which it was intended. That is an ingenious contention, but I think that we cannot say, looking at the matter as one of principle, that no profits are made by the committee of the hospital because, for very good and honourable reasons, they are desirous of making their institution as good in

1887

ST. ANDREW'S HOSPITAL, NORTHAMPTON v. SHEARSMITH.

Lord Coleridge, C.J.

all physical respects as it can possibly be made by the expenditure of large sums of money. It is admitted that, although the committee are no doubt anxious to attend to the wishes of the Lunacy Commissioners, there is no actual legal necessity that they should so expend the profits which they make. Although it may be true that they would not think it necessary to make the profit if they were not going to expend it in improving the hospital, yet they make the profit, and make it none the less because they expend the sums received from rich patients for very wise and reasonable and proper ends. So long as they do make profits it seems to me to be a fallacy to look at the purpose for which they expend them. I think, therefore, that both the contentions raised for the appellants fail, and that the respondent is entitled to our judgment.

FIELD, J. I am of the same opinion, and I do not think it necessary to add anything to the judgment delivered by my Lord.

Judgment for the respondent.

Solicitors for appellants: *Hensman & Marshall.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. A.

[IN THE COURT OF APPEAL.]

Aug. 5, 6.

TUCK & SONS *v.* PRIESTER.

Copyright — Picture — Infringement — Injunction — Damages — Penalties — Copies made Abroad before Registration — Sale in England after Registration — 25 & 26 *Vict. c.* 68, *ss.* 1, 3, 4, 6, 10, 11.

The plaintiffs employed the defendant, who was a printer in Berlin, to make for them copies of a drawing of which they had the copyright. The defendant executed the order, and also, without the plaintiffs' knowledge or consent, made other copies, and imported them into England. After this the plaintiffs registered their copyright under 25 & 26 Vict. c. 68, and after the registration the defendant sold in England some of the copies which he had imported.

In an action to recover penalties under s. 6, and damages under s. 11, of the Act, for infringement of the plaintiffs' copyright:—

Held, by Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., dissenting), that, though, by reason of s. 4, the plaintiffs could not recover damages from the

1887

TUCK & SONS v. PRIESTER.

defendant for the making of the unauthorized copies before the registration, they were entitled to damages for the sale of those copies after the registration.

But, *held*, that, the plaintiffs could not recover penalties in respect of the sale of such copies after registration:

Held, by Lopes, L.J., that by s. 4 the plaintiffs were, with regard to the right to recover damages and penalties, placed until registration in the same position as if they had no copyright; and that the making of the copies before registration, and the sale of those copies after registration, were so connected together that the plaintiffs could not recover either damages or penalties in respect of the sale:—

Held, by all the Court, that there was an implied contract that the defendant should not make any copies of the drawing other than those ordered by the plaintiffs, and that, independently of the statute, the plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract.

Decision of Divisional Court (ante, p. 48) reversed.

APPEAL by the plaintiffs against the judgment of a Divisional Court (Grove and Denman, JJ.), for the defendant (ante, p 48).

The action was brought to recover damages and penalties in respect of an infringement by the defendant of the plaintiffs' copyright in a water-colour drawing, called "Sounding the Charge." The plaintiffs, who were art publishers in London, had purchased the copyright from the artist. In January, 1884, the plaintiffs sent to the defendant, who was a printer carrying on business in Berlin, a written order to make 2000 copies of the drawing for them. The defendant executed the order, and he also, without the knowledge or consent of the plaintiffs, made a number of other copies for himself, and imported some of those copies into England. On January 21, 1886, the plaintiffs for the first time registered their copyright in the drawing, under the Act 25 & 26 Vict. c. 68, and after the registration the defendant sold in England some of the copies which he had made before the registration, selling them at a lower price than that at which the plaintiffs sold their copies. On discovering this, the plaintiffs commenced the action, claiming penalties under s. 6, and damages under s. 11 of the Act. (1) They also claimed an injunction.

(1) 25 & 26 Vict. c. 68: "Whereas by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended."

Sect. 1: "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before

The Divisional Court held that the Act did not prohibit the sale after registration of a copy made before registration of a

the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death. . . . ."

Sect. 2: "Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object."

Sect. 4 provides that a register shall be kept "wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act . . . and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

Sect. 6: "If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

Sect. 11: "If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited,

1887

TUCK & SONS v. PRIESTER.

work in which there was a copyright under the Act, and that the plaintiffs were not entitled to any relief.

The plaintiffs appealed.

Aug. 5. *Sir E. Clarke, S.G., McCall,* and *Scrutton,* for the plaintiffs. Whatever may be the true construction of the different Copyright Acts, the plaintiffs independently of those statutes are entitled to an injunction and damages. The statement in the preamble of 25 & 26 Vict. c. 68, that there was then by law no copyright in paintings, &c., is incorrect, unless indeed the word "copyright" is used in the limited sense of "the exclusive right of reproduction after publication." At common law the author of a picture, like the author of a letter, had a right to prevent anyone from copying it without his consent. In *Turner* v. *Robinson* (1) it was held that "at common law, a painter has, before publication of his picture, a right to prevent any person from copying it. The owner of the picture who has purchased it from the painter has the same rights. After publication that right is lost. The sale of a picture is not a publication of it."

But the plaintiffs are entitled to damages and penalties under 25 & 26 Vict. c. 68. The copyright is conferred by s. 1 of the Act, and it exists before registration under s. 4. Both ss. 3 and 4 recognise the copyright as existing before registration. The copyright exists from the time when the work is made, though by reason of s. 4 there is no remedy under the Act until registration: *Graves' Case.* (2) Sect. 4 prevents the proprietor of the

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or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: Provided that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity."

(1) 10 Ir. Ch. Rep. 121.

(2) Law Rep. 4 Q. B. 715.

copyright from recovering either penalties or damages in respect of anything done before registration, but the plaintiffs are claiming penalties and damages for a sale made after registration. The sale is a distinct act from the making of the copies. The words "benefit of this Act" in s. 4 may refer to the right of stopping the importation of pirated copies which is conferred by s. 10. The words "unlawfully made" in s. 6 are equivalent to "made without the consent of the proprietor of the copyright." In the Act 8 Anne, c. 19, s. 1, the words used were "without the consent of the proprietors." In the Act 8 Geo. 2, c. 13, s. 1, the same words were used. In s. 15 of the Act 5 & 6 Vict. c. 45, the words "so having been unlawfully printed," clearly mean "printed without the consent of the proprietor." So, in s. 6 of the Act now in question, the expression "unlawfully made" has a similar meaning.

In *Novello* v. *Sudlow* (1), which was a case under the Act 5 & 6 Vict. c. 45, Talfourd, J., who delivered the judgment of the Court, said (p. 189), speaking of s. 15 of that Act: "The language, however, of the clause is not new; it is adopted from the corresponding section of 54 Geo. 3, c. 156 (s. 4), which it follows, except that, instead of repeating the words 'without the consent in writing,' to each condition of infringement, it uses the words 'so unlawfully printed,' &c., which were, perhaps incorrectly, adopted to avoid repetition. Whether the words so substituted have the effect of implying the necessity of written consent, or whether the last words, 'without such written consent as aforesaid,' apply to all the antecedents, are questions only incidentally raised, as affording arguments or illustrations of the matters in discussion, and which we do not feel it necessary to decide."

If no copy made abroad were "unlawful," the provisions of s. 6 as to importation into England would have no effect; they would apply only to copies made in England and exported, and afterwards re-imported. If a copy was made with the consent of the proprietor, it could not be "unlawful;" "unlawful" must, therefore, mean, made without that consent.

Reid, Q.C., and *Henry Kisch*, for the defendant. In determining whether the defendant committed any breach of contract

(1) 12 C. B. 177.

1887

TUCK & SONS v. PRIESTER.

in making copies of the picture for himself, regard must be had to the course of business between him and the plaintiffs. The price paid to him by the plaintiffs for producing their copies was so small that he would not have been remunerated for his labour, unless he was enabled to make copies for himself, and the previous dealings between him and the plaintiffs shew that he was entitled to do so.

"Copyright" properly so called is entirely the creature of statute: *Jefferys* v. *Boosey*. (1) There is, no doubt, a right of property in a work of art before publication, which will be protected like any other right of property; but the preamble of the Act was accurate in saying that there was no "copyright" before the passing of the Act. At any rate, the preamble cannot be disregarded. Sect. 1 of the Act does not confer any copyright before registration; it only states who is to have the right, if he complies with the provisions of the Act. It gives that person the right to acquire a copyright, if he registers in compliance with the Act. The true construction is that no copyright exists until registration. If a copy of the work was surreptitiously obtained before registration, the author might be able to obtain an injunction: *Prince Albert* v. *Strange*. (2) *Grave's Case* (3) does not shew that "copyright" exists under the Act before registration. Before registration the person entitled to the copyright can have neither "benefit" nor remedy under the Act. He can derive no advantage whatever from the Act. He stands in the same position as if the Act had not been passed. He is not the proprietor of any copyright until registration. Before registration no consent is required for the making a copy of the work, and therefore the sale after registration of a copy made before is not within the Act. There is no "subsisting" copyright in such a case. If the plaintiffs' construction of the Act is right, a man might before the registration of a copyright spend hundreds of pounds in taking copies of a work, and then by mere registration he might be deprived of the profit of his expenditure, and all the copies he had made might be forfeited. There is no one who can give his consent to the making of copies until registration, and no

(1) 4 H. L. C. 815. (2) 2 De G. & S. 652; 1 Mac. & G. 25.
(3) Law Rep. 4 Q. B. 715.

copies can be "unlawfully made" before registration. The judgment of the Divisional Court is right.

Sir E. Clarke, S.G., in reply, referred to *Ex parte Beal.* (1)

Cur. adv. vult.

Aug. 6. LORD ESHER, M.R. The plaintiffs entered into a written contract with the defendant by which the defendant undertook to make a specified number of copies of a picture which belonged to the plaintiffs, in order that the plaintiffs might be able to sell those copies for their own profit. The contract being a written one, it must be construed by the writing alone, and the plain, honest meaning of it was this, "You are to make those copies for us, and then you are to return the picture to us, and you are not to make any other copies for your own benefit." That term was implied as plainly as anything could be. Instead of doing this the defendant, after he had made the specified number of copies for the plaintiffs, made other copies of the picture for himself, with the intention of selling them for his own profit, and he sent a number of those copies to England with the intention of selling them there, and, what was worse, of selling them at a lower price than that at which the plaintiffs were selling theirs. This was a plain breach of contract, and under such circumstances I cannot doubt that, quite irrespectively of the Act of 1862, a Court of Equity would grant an injunction and damages against the defendant.

The question is, whether under the statute the plaintiffs have the same rights, and perhaps more, and this depends on the construction of the Act. I will not read the preamble of the Act; I will assume it to be true that no "copyright" in works of art existed before the Act. Then what is the effect of s. 1? If that section had stood alone, and there had been nothing else in the Act, and there had been no copyright before the Act, it would have given to the author of any of the works mentioned in the section a copyright in the work from the moment he had made it, and a right to sue for the breach of that copyright. Which of these two things is a "benefit" to him? What would be the use of a "copyright" without the right to sue for an infringement of

(1) Law Rep. 3 Q. B. 387.

1887

TUCK & SONS v. PRIESTER.

Lord Esher, M.R.

it? It would be a mere name, and of no practical value at all. If s. 1 had stood alone it would have given the author of the work this right and this benefit, and, no time being mentioned from which the right is to begin, it would begin from the time of the making of the work. This construction is fortified by ss. 2 and 3, both of which seem to assume that the "copyright" exists from the moment when the work is made. And *Graves' Case* (1) seems to me an absolute authority for this construction. What, then, is the effect of s. 4? It was not needed to give the copyright, which had been already given by s. 1, or to give the right to sue for the infringement of that copyright. It seems to me to bridle the right—to limit it. The legislature desired to force the owner of the copyright to register it, and having described that which, to my mind, is the "benefit" of the Act—the right to sue for an infringement of the copyright—they say, "You shall not be entitled to that benefit, you shall not be able to sue for a breach of your copyright, until after registration." If the words "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration" had stood alone, the proprietor of the copyright might after registration have sued for a breach committed before registration; at any rate it would have been very doubtful whether he could not have done so. The legislature wished to limit the right to sue still further, and therefore they added the words, "no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration." The proprietor of the copyright has no right to sue at all for a breach of it until after registration, and, even when he has acquired the right to sue, he cannot recover in respect of anything done before registration. That is an additional limitation of his right to sue. The copyright exists from the moment when the work is made; from the moment of registration the proprietor can sue in respect of a breach of it, but he can only recover in respect of a breach committed after registration. That, as it seems to me, is the effect of s. 4. I will pass over s. 6 for the present, and will proceed to consider s. 11. That section provides that if any person not being the proprietor for the time being of the copyright, shall, without the consent of

(1) Law Rep. 4 Q. B. 715.

1887

TUCK & SONS v. PRIESTER.

Lord Esher, M.R.

such proprietor, copy the work for sale, or shall import into the United Kingdom, or sell, any copy of the work made without such consent, the proprietor may recover damages in an action on the case against the person so offending, and may also in addition in the same action recover and enforce the delivery to him of all unlawful copies, or may recover damages for the retention or conversion thereof. What is the breach in respect of which the proprietor may recover damages? If the breach relied upon is the making of a copy of the work before the registration of the copyright, then, by reason of the final clause of s. 4, the proprietor cannot recover damages in respect of that breach. But then s. 11 says, "or sell . . . any copy made without such consent," that is, the consent of the proprietor. What is the limit of time? The thing described is a copy made without the consent of the proprietor. Does not that hit the present case exactly? The copies sold by the defendant were made without the plaintiff's consent, and they were sold after registration. I cannot doubt that the words of s. 11 exactly describe what was done by the defendant. A copyright existed in the picture, and, without the consent of the proprietors, copies were made by the defendant. By reason of a statutory limitation the plaintiffs cannot sue the defendant for making the copies, because they were made before registration. But I cannot doubt that it was absolutely wrong to make copies of that in which another man had the copyright without his consent. By reason of an administrative difficulty—the want of registration—the plaintiffs cannot sue in respect of that wrong. But then after registration the defendant goes on and sells the copies which he had made before registration, and in respect of that sale the plaintiffs can recover damages. What does the word "unlawful" in s. 11 mean? There is but one meaning which can be given to it. The existence of the copyright made it wrong to copy the work without the consent of the proprietor—it is the copying without his consent, and nothing else, that makes the copy "unlawful." "Unlawful" is equivalent to "made without the consent of the proprietor." If the proprietor registers his copyright after the piracy of copying it has been committed, and then after the registration the man who has committed the piracy persists in

1887

TUCK & SONS v. PRIESTER.

Lord Esher, M.R.

doing any of the other things mentioned in s. 11, such as selling the pirated copies, he is liable to damages for that which he does after the registration, though what I have called the bridle contained in s. 4 prevents the owner of the copyright from recovering damages for that which was done before the registration. The plaintiffs, therefore, are entitled under the general law, by reason of the defendant's breach of contract, and of the trust reposed in him, to an injunction and damages, and they are entitled to the same injunction and damages under the statute.

But then comes the question whether the plaintiffs are also entitled to recover penalties under s. 6. We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections. After fully considering s. 6 I have, though with considerable hesitation, come to the conclusion that it may be reasonably read as not imposing the penalty when the copy sold was made in a foreign country, not in England. The making in a foreign country of a copy of a work in which there is a copyright only in England, may reasonably be said not to be "unlawful," and if so the sale of such a copy in England is not a sale of a copy "unlawfully made." Sect. 6 is expressed differently from s. 11, and it is a penal section. On the whole I prefer the construction that penalties cannot be recovered in such a case.

The plaintiffs are, therefore, entitled to damages and an injunction, but not to penalties, and the judgment of the Divisional Court must be varied accordingly. Under the circumstances, I think the plaintiffs ought to have their costs of the trial, and also their costs in the Divisional Court and in this Court.

LINDLEY, L.J. I have come to the same conclusion, after listening attentively to the argument, and looking carefully through the Act.

I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the

plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.

The principles applicable to this part of the case were expounded with great clearness by the late Lord Justice Turner (then V.C.) in *Morison* v. *Moat*. (1) In that case the defendant had been intrusted by the plaintiff with the secret of making a kind of medicine, which the plaintiff called a patent medicine, though he had no patent, and it was contended on behalf of the defendant that, inasmuch as the plaintiff had no exclusive right by patent or otherwise, no injunction could be granted to restrain the defendant from using the secret. But the Vice-Chancellor shewed the fallacy of that argument, and said that it did not at all follow that, because there was no patent, and the plaintiff had no exclusive right under the patent law, there might not be such a relation between the plaintiff and the defendant, and such a breach of contract or breach of faith on the part of the defendant, as would entitle the plaintiff to an injunction against him, and an injunction was accordingly granted. The principle of that case has been followed in numerous others to which I need not refer, and that principle appears to me to carry the present plaintiffs' right to an injunction beyond all reasonable controversy; and I do not quite understand why in the judgment of the Divisional Court no allusion was made to the injunction. The only explanation I can imagine is, that the case was fought in the Divisional Court on lines different from those on which it had been fought before Day, J. I do not mean to say that the injunction was not mentioned; but the real struggle was, upon the construction of the Act of Parliament, for the right of the

(1) 9 Hare, 241.

1887

UCK & SONS v. PRIESTER.

Lindley, L.J.

plaintiffs to damages and penalties, and the injunction was rather lost sight of. With regard to the injunction, the case appears to me to be entirely undefended.

With regard to the main controversy, the construction of the statute, I have come to the conclusion that the construction put upon it by the Master of the Rolls is correct. We must bear in mind that this statute is one of a group of statutes relating to copyright. That group consists of, first, some statutes relating to literary copyright; secondly, some statutes relating to engravings; and, thirdly, the statute now in question, which relates to copyright in works of art. There is another group of statutes which is perhaps more akin to patent law, I mean the Copyright of Designs Acts, which I will leave out of consideration, because the other group is the more material for the present purpose. If we look at the group as a whole we shall find (subject to the difficulty which arises on the construction of this particular Act) that the Act in each case creates a right—an exclusive right—to print, or reprint, or multiply copies of the work in which copyright is said to exist. My own impression, not formed now for the first time, but after careful consideration of the subject, is, that the preamble of this Act is correct, and that it was true in 1862 that "by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works." I am quite aware of the ambiguity of the word "copyright." But that which is called "copyright" at common law has been shewn by the decision of the House of Lords in *Jefferys* v. *Boosey* (1) to be an incident of property and nothing more. "Copyright" under the Act is something far beyond that: it is the exclusive right of multiplying copies of a work already published, and the preamble appears to me to be quite accurate, if you understand the word "copyright" in that sense.

Now, looking at this particular Act relating to copyright in works of the fine arts, we find that the right is created and defined by s. 1, and it is declared by s. 3 to be personal estate, and to be assignable at law; and, subject to some observations which I shall make presently upon s. 4, it seems to me perfectly plain that, under the first three sections, the persons who are

(1) 4 H. L. C. 815.

within the provisions of those sections have conferred upon them a right which is called "copyright"—an exclusive right of copying such works as are therein enumerated, and that that right is personal estate, capable of assignment before registration under s. 4.

That this is not a new view of the Act is shewn by *Graves' Case*. (1) In that case Mr. Millais had acquired the copyright in a picture under this Act; he had assigned the copyright, and the assignment had not been registered. The assignee assigned the copyright, and his assignee again assigned it to Graves, Graves registered the assignment to himself, and it was held that, after that registration, he was entitled to such remedies as he sought in the particular case. But it was distinctly held by the Court, and, consistently with their judgments, it must have been so held, that Mr. Millais had acquired a copyright capable of assignment: that his assignee had acquired a copyright capable of assignment, and that what Mr. Graves had acquired from his assignor was a copyright capable of assignment. It was necessarily involved in that decision that each of those persons had acquired some "benefit" under the Act. That benefit was the enjoyment of a property capable of transmission from one person to another, and I cannot read s. 4 of the Act as destroying the right which is conferred by the first three sections. Sect. 4 provides for the registration of "a memorandum of every copyright to which any person shall be entitled under this Act," so that the thing to be registered is a "copyright." You must have the "copyright" before you can register it; you cannot register anything else: you must register the "copyright" which has been already conferred, that is, the exclusive right which s. 1 has given you, and which is one of the most important "benefits" conferred by the Act. It is the foundation of the benefits which follow from registration. Then comes the clause which gives rise to the whole difficulty on the first part of this case. After providing for registration, s. 4 goes on to say: "No proprietor of any such copyright shall be entitled to the benefit of this Act until such registration; and no action shall be sustainable, nor any penalty be recoverable in respect of anything done before

(1) Law Rep. 4 Q. B. 715.

1887

TUCK & SONS v. PRIESTER.

Lindley, L.J.

registration." The word "benefit" is, of course, ambiguous. One construction—the construction put upon it by Mr. Reid in his argument, and adopted by the Divisional Court—is that it includes the copyright itself, so that, according to that construction, although you cannot register anything except the copyright, there is no copyright to register when you do register. That, as it seems to me, would be reducing the word "benefit" to an insensible signification, and I think you must restrict the word "benefit" to something short of that, in order to give an intelligible effect to all these sections. I think there is no difficulty in giving such a construction to the word "benefit." It must be rembered that in 1862 suits in equity were not called "actions," and I take it that the first part of this clause—that "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration"—would prevent any unregistered proprietor of a copyright from obtaining an injunction in a Court of Equity in respect of anything done before registration. That is one of the "benefits" which he could not enjoy until registration. Another "benefit" which he could not enjoy until registration is the right of stopping pirated copies by the officers of the Customs, which is conferred by s. 10. The impossibility of obtaining protection in those two ways before registration follows, not from the last clause of the section—"No action shall be sustainable, &c."—but from the previous clause: "No proprietor shall be entitled to the benefit of this Act." Then we come to the final clause, which was applicable in 1862 to an action for damages (which did not then include a suit in equity), and to penalties, and by reason of that clause the proprietor of a copyright could not, until registration, maintain an action for damages, or recover any penalties for an infringement of his copyright. The other "benefits" of which he would be deprived before registration are those which I have already mentioned, of which he is deprived not by the final clause of s. 4, but by the previous clause. The two clauses apply to different things. That construction does not appear to me a forced one, if we look at this Act alone. But, if we look at the whole group of Acts relating to copyright, and especially at the Literary Copyright Act (5 & 6 Vict. c. 45), we find that this construction is imposed

by s. 24 of that Act in clear and intelligible language. Under s. 24 of the Literary Copyright Act there can be no doubt that an author has a copyright before registration, though he can obtain no redress in respect of any infringement of it until he has complied with the provisions of s. 13 as to registration. The same principle, I think, is applicable to the Act of 1862, and it affords the key to its true construction.

It appears to me, therefore, that there was vested in the present plaintiffs a copyright in this picture, but that that copyright was conferred by the Act, and was confined to this country. They had no copyright abroad. There was no piracy—there was nothing "unlawful"—in copying in Germany or elsewhere abroad that picture in which the plaintiffs had acquired a copyright under this Act. If by virtue of any of the international treaties the plaintiffs had a copyright in Germany, we have not been informed of it, and I assume that they had not. They are not at liberty, therefore, to complain under this Act of any infringement of their copyright which took place abroad, for they have no copyright abroad.

Now, bearing that in mind, I will consider the damages section, before I go to the penalties section. The right to damages is conferred by s. 11, which is more clearly expressed than s. 6, which relates to penalties. Sect. 11 says that, "If any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, &c., any such work"—that is one thing—"or sell, publish, &c., or offer for sale, &c., any repetition, copy or imitation of such work, made without such consent as aforesaid"—that is another thing—then the proprietor may recover damages in an action on the case; and, moreover, the proprietor, "may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, or may recover damages for the retention or conversion thereof."

The plaintiffs were registered as the proprietors of the copyright on January 21, 1886 (they had, in my view, acquired the copyright long before the registration). Previously to that date the picture of which they had the copyright had been copied by the defendant in Berlin. That copying was, as I have already

1887

TUCK & SONS v. PRIESTER.

Lindley, L.J.

said, no infringement of the copyright, because the copyright did not extend to Germany. But after the registration copies made in Berlin and brought to this country (whether they were brought to this country before the registration I do not know) were sold by the defendant in this country on February 16. That is the sale of which the plaintiffs complain. Why cannot the plaintiffs, now that they are registered, recover damages in respect of that sale which has taken place since the registration? The sale appears to me plainly within the words of s. 11, and the only ground upon which it can be said that the plaintiffs cannot recover damages is this; that their consent was not necessary when these copies were made. That appears to me an erroneous construction of the Act, and I think the Divisional Court were mistaken in the view which they took of the effect of the latter part of s. 4. I think this case is brought literally within the words of s. 11, and I can see no answer to it. This entitles the plaintiffs to damages, and also to an injunction, if the defendant threatens and intends to continue the sale, quite apart from the equitable ground to which I have already referred.

I think, therefore, that Day, J., was right in holding the plaintiffs entitled to damages and an injunction.

As to the penalties, I agree with the Master of the Rolls that the probable meaning—I may almost say the certain meaning—of the word "unlawfully" in s. 6, is "without consent." But I do not think it would be right in a penal section to substitute "without consent" for "unlawfully," because a great injury might be done to the defendant by substituting what you may call an equivalent for the language actually used in the Act. If the copies of the picture which were made in Berlin had been made in England, I think the words "without consent" might fairly enough be substituted for "unlawfully" in s. 6. But, as the word "unlawful" strictly speaking means contrary to some law, and this Act has no application to Berlin, I feel a difficulty, in dealing with a penal section, in saying that the defendant imported into this country or sold copies which he knew to have been "unlawfully made." They were not "unlawfully made" in one sense of the word, though, of course, if you construe "unlawfully" as equivalent to "without consent," they were, but I doubt

whether in a penal section that construction would be right. It seems to me that we should be treading upon very dangerous ground, and, having regard to the well-settled rule that the Court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it, I think we ought to keep on the safe side and say that the words "unlawfully made" are sufficiently ambiguous to enable the defendant to escape from the penalty which is imposed by s. 6. If the plaintiffs had a copyright in Germany under the International Copyright Acts and Treaties, I am disposed to think that then the defendant would have imported or sold copies which he knew were "unlawfully made;" but, in the absence of any such international copyright, I cannot say that what was done by the defendant in Germany was "unlawfully" done within s. 6. It seems to me that, s. 6 being a penal section, the sounder view is that the defendant is not brought within it, and has not incurred any penalties. It follows from this construction that there is what I may call a defect in the Act, for it is obvious that under s. 10 the importation of these copies into England might have been stopped. Sect. 10 clearly contemplates that that may be done abroad which is prohibited by the Act, and then, copies having been made abroad without the consent of the plaintiffs, the importation of them into England could have been stopped under s. 10. If my construction of s. 6 is right, it follows that, though these copies could have been stopped in the custom house, the defendant escapes penalties under s. 6, if they are not stopped. That looks like a defect in the Act. But, dealing with a penal clause, we ought to apply to it that strict or cautionary interpretation which the Courts are in the habit of giving to such clauses. Therefore, although I have no hesitation about the plaintiffs' right to damages and an injunction, I think it is safer to say that they have not established their case as to penalties.

LOPES, L.J. I am sorry that I am compelled to differ from my learned brethren as to the construction of the Act. I do so with great diffidence, but I am confirmed in my opinion by the judgments of the Divisional Court. Before the Act there was no

1887

TUCK & SONS v. PRIESTER.

Lopes, L.J.

"copyright," properly so called, in works of art, before publication, but only such a right of property as every man has at common law in the fruit of his own labour. And there was no "copyright" in such works after publication. Sect. 1 of the Act creates a statutory monopoly or exclusive right of multiplying copies of works of art after publication. I differ from my colleagues as to the meaning of the latter part of s. 4. I assume that the words were inserted with care, and that every word was intended to convey some meaning. The latter part of s. 4 provides that "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration," and it does not stop there, for it goes on to say, "and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration." In my opinion, the effect of these words is this, that the person who under s. 1 has acquired a statutory copyright is to be, before and until registration under s. 4, in the same position as if the Act had never been passed. So far as the right to recover damages and penalties is concerned, he is, until registration, to stand in the same position as if he had not acquired a statutory copyright at all. At the time when these copies of the plaintiffs' picture were made by the defendant they were "lawfully" made. The defendant has sold copies which are not protected by the Act, because they were made before the registration of the plaintiffs' copyright. To my mind it is impossible to separate the making of the copies from the sale. I think the plaintiffs would be really recovering damages and penalties in respect of something which was done before the registration.

I entirely agree with the rest of the Court that the plaintiffs are entitled to an injunction and damages on the ground of breach of contract.

Appeal allowed.

Solicitor for plaintiffs: *Herbert Bentwitch.*

Solicitors for defendant: *Heath, Parker, & Brett.*

W. L. C.

YARMOUTH *v.* FRANCE. 1887 Aug. 11.

Negligence—Employer and Workman—Driver employed by Wharfinger—Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42)—*Vicious Horse—Risk voluntarily incurred—Volenti non fit Injuria*—"*Workman*"—"*Plant*," "*Defect*" *in Condition of.*

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal, and his leg was broken:—

Held, by Lord Esher, M.R., Lindley, L.J., and Lopes, L.J., sitting as a Divisional Court, that the plaintiff was a "workman" within the definition in s. 8 of the Act:—

Held, by the majority of the Court, Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., expressing no opinion), that the horse which injured the plaintiff was "plant" used in the business of the defendant, and that the vice in the horse was a "defect" in the condition of such plant, within the meaning of s. 1 of the Act:—

Held, by the majority of the Court, Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., dissenting), that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively shew that the risk was voluntarily incurred by the plaintiff.

Thomas v. *Quartermaine* (18 Q. B. D. 685) distinguished.

By Lopes, L.J., dissenting, that there was no evidence for the jury of the defendant's liability, inasmuch as the facts shewed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment.

ACTION under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), tried in the City of London Court, without a jury. The facts were as follows:—The plaintiff was in the employ of the defendant, a wharfinger and warehouseman in London. He had the care of a horse and trolley, part of his duty being to load the trolley and to unload and deliver goods to the consignees, and to return with the trolley to his employer's premises, and there stable the horse. He had been so engaged for about four years. In August, 1886, the defendant bought a new horse,

1887

YARMOUTH v. FRANCE.

which was placed under the plaintiff's control by the defendant's stable-foreman, Tomlin. The plaintiff found that the animal was vicious,—a kicker and a jibber,—and altogether dangerous and unfit to be driven; and he repeatedly complained of it to Tomlin, who had the general management and control of the defendant's horses, telling him that he objected to drive so unsafe an animal. Upon these occasions Tomlin's answer was, "Go on; you must keep driving;" adding, "if you meet with an accident, we shall have to stand responsible for that." The plaintiff went on driving the horse until the 12th of November, when, whilst sitting on the fore part of the trolley (the only place provided for the driver's seat), with his legs hanging down, the horse, without (as the plaintiff swore) any provocation, kicked out and broke one of his legs. There was no evidence that the plaintiff had ever complained to the defendant himself, or that the complaints he made to Tomlin had ever been made known to the defendant.

It was objected on the part of the defendant, that the evidence disclosed no cause of action under the Employers' Liability Act; that the plaintiff was not a "workman," nor was the horse "plant," within the Act; that the plaintiff had been guilty of contributory negligence; and that, having continued to drive the horse after he became aware of its vicious character, he must be taken to have assented to incur the risk of accident therefrom (citing *Thomas* v. *Quartermaine*. (1))

The judge held that the plaintiff was a "workman," and that the horse was "plant" within the Act: but he further held, upon the authority of *Thomas* v. *Quartermaine* (1), that as the plaintiff continued to drive the horse after he had become aware of its vicious nature, he must be assumed to have assented to take upon himself the risk attending it; and he accordingly gave judgment for the defendant.

The plaintiff appealed, and the argument took place before Lord Esher, M.R., Lindley, L.J., and Lopes, L.J., sitting as a Divisional Court.

1887. July 26. *W. E. Hume Williams*, for the plaintiff. First, the plaintiff was a "workman,"—a person engaged in manual

(1) 18 Q. B. D. 685.

labour,—within the definition given in s. 10 of the Employers and Workmen Act, 1875 (1); secondly, the horse which caused the injury was "plant" within s. 1, sub-s. 1 of the Employers' Liability Act, 1880; and, thirdly, that the plaintiff, having called the attention of the defendant's foreman (under whose orders he worked) to the fact that the horse was dangerous and unfit to be driven, had brought himself within sub-s. 3 of s. 2, and was not disentitled to recover by reason of his having under the circumstances continued in his employment rather than risk dismissal for disobedience of orders. *Thomas* v. *Quartermaine* (2) is distinguishable. There the plaintiff, knowing the dangerous condition of the premises, and making no complaint, might fairly be assumed to have assented to incur the risk incident to his employment. [He cited *Paterson* v. *Wallace* (3), and *Clarke* v. *Holmes* (4).]

Wood Hill, for the defendant. *Cook* v. *North Metropolitan Tramways Co.* (5) shews that a "driver" is not a workman within the Employers and Workmen Act, 1875, and consequently not entitled to the benefit of the Employers' Liability Act, 1880; secondly, the term "plant" in s. 1, sub-s. 1, of the last-mentioned Act is confined to fixtures and other inanimate chattels used in a trade or business. But, even assuming that a horse could be considered to be "plant," the case is governed by *Thomas* v. *Quartermaine*. (2) The plaintiff, if he objected to the risk involved in driving the horse, might have relinquished his employment. His reluctant assent to obey the orders of the foreman did not make him the less a free agent.

[He cited *Woodley* v. *Metropolitan District Ry. Co.* (6), per Cockburn, C.J.]

Cur. adv. vult.

1887. Aug. 11. LORD ESHER, M.R. In this case, the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts or trolleys and horses. Amongst these was a horse which was of an extraordinarily

(1) 38 & 39 Vict. c. 90.
(2) 18 Q. B. D. 685.
(3) 1 Macq. 748.
(4) 7 H. & N. 937; 31 L. J. (Ex.) 356.
(5) 18 Q. B. D. 683.
(6) 2 Ex. D. 384.

1887

YARMOUTH v. FRANCE.

Lord Esher, M.R.

vicious nature and wholly unfit, so far as is stated to us, to be driven even by the most careful driver. The plaintiff objected to drive him, and told the foreman of the stable that the horse was unsafe to drive: whereupon the foreman said: "You have to drive him; and, if any accident happens, we (meaning the employer) will be responsible." The plaintiff continued to drive the horse, and whilst so doing, sitting on a part of the trolley where it is said to be usual and not improper for the driver to sit, the horse kicked out and broke the plaintiff's leg. The plaintiff thereupon sues the owner of the horse, his employer. The judge of the City of London Court did that which I believe many county court judges have done since the decision of the Court of Appeal in *Thomas* v. *Quartermaine*. (1) The moment it was proved before him that the plaintiff knew the horse to be vicious, but continued to drive him, the judge said it was useless to inquire further, for that alone disentitled him to recover, upon an application of what is called the maxim of Volenti non fit injuria. The judge acted upon the notion that that was the effect of the decision of the majority of the Court of Appeal in *Thomas* v. *Quartermaine* (1): and, as I am given to understand, many county court judges have from the time that case was reported supposed that to be the effect of it. We are called upon now to say whether that is the true effect of the decision. My own position in the matter is extremely delicate, because I dissented from the decision of the rest of the Court. I thought, and, after mature consideration, I have still the strongest conviction, that, if that is really the effect of it, the decision in that case was absolutely wrong; but I hope I have loyalty enough to say, that, if I thought that the decision of the majority of the judges there did mean what the county court judges have supposed it to mean, I should at once bow to it. The question we have now to consider is, whether that was the real meaning of the majority,—whether the judgment was not to a less rigid effect than that, and whether it does not leave open certain questions which must still be tried.

The first question here is, whether this case is within the Employers' Liability Act at all. If it be not, then, according to

(1) 18 Q. B. D. 685.

the old law, if that Act had not existed, I have no doubt this plaintiff could not have recovered. He would have been a servant in the employment of the master, a part of whose machinery for carrying on his business was defective,—in such a state that it would be a culpable want of care for the safety of his servants on the part of the employer to permit a necessary part of the machinery for carrying on his business to remain. But that was no concern of the jury. At all events it was a thing which was patent, so that any person in the employ could know and see it. The horse here in question was not accidentally or suddenly vicious, but inherently vicious, and known to be so. Under the old law it would have been said: "You" (the servant) "have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer." As between master and servant, that was the way the immunity from liability was always stated. The maxim Volenti non fit injuria was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed. That being so, then comes the question, what is to be the effect of the Employers' Liability Act? Does that Act apply to the present case?

Now, the first question must be, whether the plaintiff was a "workman" within the definition given in the Employers and Workmen Act, 1875. I cannot entertain a doubt upon that. He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley and the navigating of the lighter form the easiest part of the work: his real labour, that which tests his muscles and his sinews, is, the loading and unloading of the trolley or the lighter.

Then comes the question which is somewhat more difficult,—can a horse be considered "plant" within s. 1, sub-s. 1, of the Employers' Liability Act? It is suggested that nothing that is

1887

YARMOUTH v. FRANCE.

Lord Esher, M.R.

animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses horses and carts, wagons, or drays, seem to me to form the most material part of the plant: they are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees: and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot for a moment be contended that the carts and wagons are not "plant." Can it be said that the horses, without which the carts and wagons would be useless, are not? If, then, this horse was part of the plant, it had a defect, that is, it had the constant habit, whether in a stable or harnessed to a trolley, of kicking whatever was near it, whether a human being or a brick wall. In short, it was a vicious beast that could not be managed or controlled by the most careful driver. The plant, therefore, was defective. There was no evidence that the master (the defendant) knew of the defect. But the foreman, who had the management of the stable and under whose directions the horse was used, knew it; and, after having repeatedly been told that it was unsafe, he said what practically amounted to this: "I care not whether the horse is vicious or not; you have got to drive him; and it matters nothing to you, for, if you meet with an accident, the master will be responsible." The foreman probably had no power to bind his master to that; but it is at all events conclusive to shew that he realised the fact that the plant was defective: and nothing was done to remedy the defect. Was this negligence on the part of the foreman for which the master was responsible? If the master had any duty at all to take care of his workmen, then allowing this imperfect plant to continue to be used was surely a breach of that duty. But it is said he may have had that duty, and may have neglected it as to those of his workmen who did not know of or were not affected by the particular defect, but not as to the plaintiff, who, knowing of the defect, still continued to drive the horse, and therefore comes within the maxim referred to. I confess that has always

seemed to me to be not a bad way of illustrating the result; but it is, to my mind a horrible way of stating the duty, to say that a master owes no duty to a servant who knows that there is a defect in machinery, and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and in my view utterly abominable. It may be that the breach of this duty gives no right of action,—that it is what is called a duty of imperfect obligation. Although the employer does not himself know of the defect, if he has put a person in his place to do what he ought himself to do, he is responsible for the negligence of that person.

Before the Employers' Liability Act, there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim Volenti non fit injuria. I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that, if we put this maxim into plain English, part of it is true; that is to say, that, if a thing is put before a workman and he is told, "Now, I do not ask you to do this unless you like; but I will give you more wages if you do. You see what it is. There is a rotten ladder: it is ten to one that it will break under you: but, if you choose to run that risk, I will give you higher wages." If the workman, seeing the risk, elects to incur it, no one could doubt that he would be precluded from recovering damages against his employer for any injury he might sustain from the breaking of the ladder. The same result would follow if the injured person was not a workman for hire. But, does the maxim Volenti non fit injuria go this length, that the mere fact of the workman knowing that a thing is dangerous, and yet using it, is conclusive to shew that he voluntarily incurs the risk? The answer to that depends (so far as this Court is concerned) upon whether or not *Thomas* v. *Quartermaine* (1) has so decided. I

(1) 18 Q. B. D. 685.

1887

YARMOUTH v. FRANCE.

Lord Esher, M.R.

never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim Volenti non fit injuria: and I can only say, as an excuse for the part I took in *Thomas* v. *Quartermaine* (1), that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my Brother Bowen. For myself, I cannot help thinking that, whether or not a workman has voluntarily agreed to incur the risk of defective machinery, is a question of fact: and that, in my opinion, would have made the decision in *Thomas* v. *Quartermaine* (1) wrong; for, the majority of the judges there took upon themselves to decide the question of fact; whereas, in my opinion, they had no right to decide it: the utmost they properly could do was to send it back to the county court. They held in that case that the facts were conclusive to shew that the plaintiff did voluntarily,—in the sense in which they understood the word,—accept the risk. This revives the old difficulty as to contributory negligence in cases of railway accidents. (2) I have always protested that it is not for the judge to say whether or not a plaintiff (or the deceased, in the case of death,) has been guilty of contributory negligence: he (the judge) has no right to hold that the evidence of it is conclusive: it should be left for the decision of the jury.

Now comes the other question, whether the Employers' Liability Act has done away with the old doctrine that a workman impliedly contracts or consents to incur a risk which is a visible and palpable one, and one which therefore he is to be taken to know of, or, if you please, which he does know of; or whether it applies only to the risks incident to common employment. For a time I was under the impression that the judgment in *Thomas* v. *Quartermaine* (1) was that the Act only absolved the employer from liability for any injury resulting from the negligence of a fellow-workman. But, upon looking at the matter more carefully, I do not think they meant to say that. It was not necessary for them to say it, because they held, that, inasmuch as the case was conclusively within the maxim Volenti non fit injuria, no other question arose in the case.

(1) 18 Q. B. D. 685.

(2) *Davey* v. *London and South Western Ry. Co.*, 11 Q. B. D. 213; 12 Q. B. D. 70.

Now, let us go back to the statute. We must look once more at s. 1, sub-s. 1,—Where, after the commencement of this Act, personal injury is caused to a workman "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." Here, I say there was such defect and consequent personal injury. Read with this sub-sections 1 and 3 of s. 2. Sub-s. 1 provides that the workman shall not be entitled under this Act to any right of compensation or remedy against the employer under sub-s. 1 of s. 1, "unless the defect therein mentioned arose from or had not been remedied owing to the negligence of the employer, or of some person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition:" and sub-s. 3, that "In any case where the workman knew of the defect or negligence (1) which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer already knew of the said defect or negligence," the workman shall in like manner be disentitled to any right of compensation or remedy. Here the defect arose from the negligence of a person in the service of the employer and intrusted by him with the duty of seeing that the plant was in proper condition, and who had notice of the defect, and failed to take steps to avert injury. To my mind it is clear that this was negligence with regard to the safety of his workman for which the employer is responsible. But then, it is said, there may be that which prevents the workman from recovering compensation for an injury sustained by him in consequence of that negligence. The implied contract which I have adverted to under the old law did prevent it. Where there is no duty, it is said, there can be no negligence; or, in other words, there may be negligence which is not actionable negligence. It is very difficult to give a

(1) See sub-ss. 2 and 3 of s. 1.

1887

YARMOUTH v. FRANCE.

Lord Esher, M.R.

sensible construction to sub-s. 3 of s. 2. The workman who discovers the defect is to give notice of it or he cannot recover. From that I infer that if he does give notice, and the defect is not remedied, he may recover. When is he to give notice? And what if the defect is not immediately remedied? Is the workman at once to refuse to incur the risk and quit the employ? That is a dilemma to which it never could have been intended to reduce the workman. I cannot help thinking that it is clearly enacted in the 3rd sub-s. of s. 2, that, if the workman gives notice of the defect, and the employer fails to remedy it, the workman's claim for compensation is valid, unless he is brought clearly within the maxim Volenti non fit injuria. Does the judgment of Bowen, L.J., in *Thomas* v. *Quartermaine* (1),—for, that is the judgment which is adopted by Fry, L.J.,—mean to say that the mere knowledge of the workman and his continuing in the employ is fatal to him? If I thought the judgment in *Thomas* v. *Quartermaine* (1) really did mean that, whatever my own private opinion might be, I should unhesitatingly bow to it. I have been trying to construe that judgment fairly. At p. 697 of the report, the learned judge, after referring to *Winch* v. *Conservators of the Thames* (2) and *Lax* v. *Corporation of Darlington* (3), says: "The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But, where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But, when it is a knowledge under circumstances that leave no inference open but one, viz. that the risk has been voluntarily encountered, the defence seems to me complete." I must confess I do not like

(1) 18 Q. B. D. 685. (2) Law Rep. 9 C. P. 378.
(3) 5 Ex. D. 78.

that way of putting it. I think there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it. In the preceding page the learned judge says: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier, must be a knowledge under such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not "*Scienti* non fit injuria," but "*Volenti.*" There may be a perception of the existence of the danger without appreciation of the risk; as, where the workman is of imperfect intelligence." So that a dull man may recover damages where a man of intelligence may not! Both know of the danger, but one is imperfectly informed as to its nature and extent!

Taking the whole of that judgment together, it seems to me to amount to this, that mere knowledge of the danger will not do: there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim Volenti non fit injuria. If so, that is a question of fact. Here, the judge of the court below has come to the conclusion that the moment it appeared that the plaintiff knew and appreciated the danger, and did not at once quit the defendant's employ, he came within the maxim, and was therefore upon the authority of *Thomas* v. *Quartermaine* (1) disentitled to recover. He did not bring his mind to bear upon the motives which induced the plaintiff to act as he did,—whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders. All that was for a jury; and the judge ought to have applied his mind to it. I see nothing in the decision in *Thomas* v. *Quartermaine* (1) to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

(1) 18 Q. B. D. 685.

1887

YARMOUTH v. FRANCE.

For these reasons, I think this case ought to go down for a new trial.

LINDLEY, L.J. The first question is, whether the plaintiff is a "workman" within the meaning of the Employers' Liability Act. In my opinion he is. His duty was, not only to drive, but also to load and unload the goods which had to be transported on the trolley which it was his business to drive. This loading and unloading requires bodily labour and exertion, and brings the plaintiff within the statutory definition of a workman. (1)

The next question is whether the horse which injured the plaintiff is "plant" within the meaning of s. 1, sub-s. 1, of the Act. There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business: see *Blake* v. *Shaw*. (2) The word "defect," and the words "way and machinery" which occur in the section, throw some doubt on whether plant can include horses; but I do not think the doubt sufficient to require the Court to hold that plant cannot include horses, or to hold that plant must be confined to inanimate chattels. The defendant in this case has a number of horses for use in his business: they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word plant is used in s. 1, sub-s. 1, of the Employers' Liability Act.

The next question is whether vice in a horse can be a defect in the condition of plant. Here, again, I think it can. I take defect to include anything which renders the plant &c. unfit for the use for which it is intended, when used in a reasonable way and with reasonable care: and, if a horse intended for drawing trolleys is from any cause unfit for such work, and a person is driving him with reasonable care, and is injured by reason of the unfitness of the horse for his work, such person may be properly said to be injured by reason of a defect in plant.

Having cleared the ground thus far, it is necessary to consider

(1) 38 & 39 Vict. c. 90, s. 10. (2) Johns. 732.

whether the defect "arose from or had not been discovered or remedied owing to the negligence of the defendant or of some person in his service and intrusted by him with the duty of seeing that the plant was in proper condition": see s. 2, sub-s. 1. The defect, i.e. the unfitness of the horse, did not arise from the negligence of the defendant, nor, in truth, of any one; nor is there any evidence that the defendant himself knew of such defect. But his stable-foreman did know of it, and he nevertheless took no steps to prevent the horse from being used for a purpose for which he knew it was unfit; for, he told the plaintiff to go on driving it, and said, if anything happened, "we," i.e. his master, "must take the consequence." This, I think, is evidence of negligence on the part of the stable-foreman for which the defendant can properly be held accountable, unless his liability is excluded upon the ground that the plaintiff not only knew of the defect but also took the risk upon himself.

This is the point which presents the greatest difficulty in the case, and which requires careful consideration.

It must be taken as settled by *Thomas* v. *Quartermaine* (1)—(1) that the words at the end of s. 1 do no more than "remove such fetters on a workman's right to sue as had been previously held to arise out of the relation of master and workman,"—(2) that s. 2, sub-s. 3, does not extend the master's liability beyond that imposed by s. 1, and s. 2, sub-s. 1,—(3), that, in each of the cases specified in s. 1, the maxim Volenti non fit injuria is applicable, and that, if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. Those principles are in my opinion perfectly sound: but the proper application of them is by no means always easy. The question whether in any particular case a plaintiff was volens or nolens is a question of fact, and not of law. Bowen, L.J., was careful to point out that the mere fact that the plaintiff knew of the danger and yet incurred it is not conclusive. He says (2): "The maxim, be it observed, is not *Scienti* non fit injuria, but *Volenti* non fit injuria." He further points out (3) that there may be cases

(1) 18 Q. B. D. 658, at p. 692. (2) At p. 696. (3) At p. 693.

1887

YARMOUTH v. FRANCE.

Lindley, L.J.

in which a non-workman who knew of a danger and incurred it might nevertheless maintain an action against the person exposing him to it. The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff. (1)

The learned judge who tried the present case thought he was bound by *Thomas* v. *Quartermaine* (2) to decide it in favour of the defendant. In this respect I differ from him. The principles laid down in that case are no doubt to be accepted and followed; and, if I may say so, I entirely concur in them: but it is not in my opinion correct to regard that case as deciding this. The facts there and the facts here are materially different. In *Thomas* v. *Quartermaine* (2) the facts were all one way: there was evidence that the plaintiff was volens, and not merely sciens; he was not even directed to do what led to his injury; he did it voluntarily, of his own accord; there was no evidence that the plaintiff was nolens; the plant was not defective or dangerous to persons engaged in the ordinary course of their employment; the plaintiff had never complained of it; the injury was the result of a pure accident: and the case might well have been decided on that ground alone. In the present case, the horse was vicious; the plaintiff was constantly complaining of it to the defendant's foreman; the foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal: nor is it possible to regard this case as one of accident. Under these circumstances, the question is whether the plaintiff, with knowledge and appreciation of both the risk and the danger, voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses: and the conversation with the foreman, though not evidence against the defendant of any promise by him to take the risk, is in my opinion admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself.

To hold that this case is concluded by *Thomas* v. *Quartermaine* (2) is, I think, to carry that case further than is warranted by the principle on which it was decided: it is to do the very

(1) See p. 696.

(2) 18 Q. B. D. 685.

thing Bowen, L.J., so carefully pointed out the danger of doing, viz. to treat sciens as equivalent to volens. The Act cannot, I think, be properly construed in such a way as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. *Thomas* v. *Quartermaine* (1) is no authority for any such construction of the statute.

If in any case it can be shewn as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it: nor can it in my opinion be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred. À fortiori might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good. Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself.

I cannot construe the Act as shutting out such considerations as these; and, as the learned judge did not think himself at liberty to entertain them, and decided in favour of the defendant

(1) 18 Q. B. D. 685.

1887

YARMOUTH v. FRANCE.

upon what I consider a misconception of *Thomas* v. *Quartermaine* (1), I think there ought to be a new trial.

LOPES, L.J. This is an important and difficult case: and I regret that I am unable to agree with the decision of the rest of the Court.

The action was brought under the Employers' Liability Act, 1880; but the judge in the court below has not decided the case on any question arising under that Act, apart from the law as it existed before the passing of that Act; but has given judgment for the defendant on the ground that the plaintiff knew all the facts, was well acquainted with the character of the horse, and voluntarily encountered the risk, and that therefore there was *no* evidence of neglience arising from any breach of duty which the defendant owed the plaintiff entitling the plaintiff to recover.

It is to be observed that s. 1, sub-s. 1, and s. 2, sub-s. 1, of the Act,—which must be read together,—effect no change in the law as regards the liability of the employer, except in certain specified cases by identifying a "person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition," with the employer, and taking him out of the category of fellow-servants, and rendering the employer responsible for his negligence.

There is nothing here to affect the doctrine of Volenti non fit injuria, if it applies: nor is that doctrine touched by anything in s. 1, sub-s. 3: but of that presently. The doctrine of Volenti non fit injuria is exhaustively dealt with in the cases of *Woodley* v. *Metropolitan Railway Co.* (2) and *Thomas* v. *Quartermaine.* (1) Both these cases were in the Court of Appeal; and the judgments of the majority of the Court are not only binding on us sitting as a Divisional Court, but are binding on the Court of Appeal itself. The question, therefore, is, whether the present case is governed by these cases or either of them.

To determine this it is essential to state shortly the facts of the present case:—The plaintiff was the driver of a trolley, and at the time of the accident had been about four years in the employ of the defendant, who was a wharfinger. The accident happened in

(1) 18 Q. B. D. 685. (2) 2 Ex. D. 384.

November, 1886. In the previous August a horse had been purchased by the defendant which was by Tomlin, the defendant's stable-foreman, assigned to the plaintiff to drive in his trolley. The plaintiff's duty was to clean, take care of, and drive the horse in his trolley, and to go with his trolley where ordered by Tomlin, who had superintendence of the horses, and to load and unload as instructed. From the first, the horse was vicious and troublesome,—so vicious and troublesome that it was said to have broken down a brick-wall, and generally to be a kicker and a jibber. The plaintiff had *constantly* complained of this horse to Tomlin, and had been told by him to go on driving the horse, and that his employer would he responsible for anything the horse did. The plaintiff, though daily, as he said, complaining, continued in the defendant's service, driving the horse. On the 12th of November, the plaintiff was driving the horse, sitting on the trolley with his legs hanging down behind the horse. There was no other place on the trolley provided for him where he could sit to drive. The horse kicked violently, broke the plaintiff's leg, and injured him severely. In these circumstances, he brings his action against the defendant. The case came on to be tried in the City of London court, without a jury; and the judge, considering it undistinguishable from *Thomas* v. *Quartermaine* (1), and that the doctrine of Volenti non fit injuria applied, stopped the case, and gave judgment for the defendant.

Is this a case where the employer is absolved from liability because the plaintiff voluntarily exposed himself to the risk, within the principle contained in the cases to which I have referred?

In *Woodley* v. *Metropolitan District Railway Co.* (2), the plaintiff was a workman not in the employment of the defendants, but in that of a contractor employed by them. He had to work in a dark tunnel, rendered dangerous by trains constantly passing. After he had been working for a fortnight, he was injured by a passing train. The jury found that the defendants were negligent, and gave a verdict for the plaintiff for 300*l*. A rule to set aside this verdict was discharged; and, on appeal, it was held by the majority of the Court of Appeal that the plaintiff, having continued in his employment with full knowledge, could not

(1) 18 Q. B. D. 685. (2) 2 Ex. D. 384.

1887

YARMOUTH v. FRANCE.

Lopes, L.J.

make the defendants liable for an injury to which he voluntarily exposed himself.

The only distinctions that I can find between that case and the present are the following,—Woodley was hired to do dangerous work, and knew its dangerous character and attendant risks. Yarmouth was hired to do work not dangerous, viz., amongst other work, to drive horses, which most frequently are manageable. The horse which did the mischief was entrusted to his care after he entered on the employment, and it was then first he learned its propensities; but long after he had been made aware of its vicious nature he continued to drive it. There was no evidence that Woodley ever made any complaint to his employer. Yarmouth, on the contrary, complained, but continued in the employment. Having regard to the judgments of the majority of the Court, I do not think that what I have suggested furnishes any substantial ground for distinction. Cockburn, C.J., says: "With a full knowledge of the danger, he (Woodley) continued in the employment, and had been working in the tunnel for a fortnight when the accident happened.—If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he *continues* in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, *in the alternative, to quit the service.* If he continues to take the benefit of the employment, he must take it subject to its disadvantages.—If a man chooses to accept the employment, or to continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work, without doing all in their power to obviate the danger, are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which as a matter of

humanity he ought not to be exposed. But, *looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury.*" This judgment, in which the majority of the Court concurred, covers the present case, and, subject to the provisions of the Employers' Liability Act, disposes of the only distinction which I am able to suggest.

The point that Yarmouth was not engaged to drive a dangerous horse is met by the fact that he continued in the service after he knew the horse was dangerous; and his constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring and of his willingness to incur that risk rather than relinquish his employment. After complaining he remains in the service for a long time, knowing the risk and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view.

In *Griffiths* v. *London and St. Katharine Docks Co.* (1), it was held that, in an action brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew but that the servant was ignorant of the danger. The present Master of the Rolls (2) said: "If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action; and, as it is necessary that these two things should exist in order to form a primâ facie cause of action, it is necessary that they should be shewn to exist in the statement of claim." And Bowen, L.J., in the same case says (3): "Both these allegations are material, because without them there is no cause of action." It is therefore abundantly clear that, as the danger was known to the servant (the plaintiff), he could not recover before the Employers' Liability Act.

It is said, however, that *Woodley* v. *Metropolitan District Rail-*

(1) 12 Q. B. D. 493; on appeal, 13 Q. B. D. 259.
(2) 13 Q. B. D. at p. 260. (3) At p. 261.

1887

YARMOUTH v. FRANCE.

Lopes, L.J.

way Co. (1), *Griffiths* v. *London and St. Katharine Docks Co.* (2), and other cases, do not govern the case before the Court. It is said that the law has been altered in cases to which the Employers' Liability Act applies; and I assume, for the purposes of this case, that the Employers' Liability Act applies to the case of this plaintiff. It is suggested that there is something in the Employers' Liability Act which qualifies the defence of Volenti non fit injuria,—a defence which would have been available for the master before the Act. It is said that a workman who can bring himself within one of the five clauses of s. 1 of the Act is not to be treated as volens, although he thoroughly appreciated the risk he was incurring, complained of it, and for a long time continued in the service, preferring the risk to quitting the service; and this, although he would have been treated as volens before the Act.

I cannot accede to this view. It is opposed to the case of *Thomas* v. *Quartermaine.* (3) The third sub-section of s. 2 is relied upon. Bowen, L.J., in *Thomas* v. *Quartermaine* (3) deals with that clause. He says (4): "The object of that clause is to limit the employer's liability, not to enlarge it." I read it thus:—Although, under s. 1, the workman, with certain exceptions, is to be placed in a position as advantageous as, but not better than, the rest of the world who use the master's premises in his business, the workman is not to have this advantage if, knowing of any defect or negligence, he does not inform the employer, as provided in that section. The object of this is, to give the employer the opportunity of remedying the mischief. In fact, the workman is not to have the advantages of the Act unless he performs the condition precedent of making the master aware of his cause of complaint. This leaves the employer's defence of Volenti non fit injuria untouched by the Act, if he can prove it. It is said that such a construction would make the Act nearly a dead letter. But this is not the case. In all cases where the workman is ignorant of the defect or negligence, and is injured by a fellow workman's negligence, "common employ-

(1) 2 Ex. D. 384.
(2) 12 Q. B. D. 493; on appeal, 13 Q. B. D. 259.
(3) 18 Q. B. D. 685.
(4) At p. 693.

ment" is no longer a defence for the master in the cases specified in s. 1, as it would have been before the passing of the Act. It is said that the object of the Act was to exclude in the specified cases the two legal inferences which were before the Act to be drawn against a workman from the mere fact of his employment, viz.—first, the inference that he accepted the risk of his fellow servants' negligence; and, secondly, the inference that he accepted the risks which were involved in the execution of his employer's orders, if he in fact ran them, rather than refuse to do so, and thereby incur the risk of dismissal. I agree that it was the object of the Act to exclude the first inference, and in the specified cases to destroy the defence of "common employment." But, what authority there is for the contention that it was intended to extinguish the second inference I fail to be able to discover.

The true construction of the third sub-section of s. 2, in my opinion, is, that whereas before the Act knowledge would have disentitled the workman to recover, now knowledge in the specified cases is no longer to create a disability, provided the workman gives information; but if, after giving information, he continues in the employment, knowing the danger he is incurring, the same inference arises as heretofore, viz. the inference that he voluntarily runs the risk, and any evidence of negligence arising from any breach of duty on the part of the employer is by the workman's conduct displaced.

I agree with the decision of the majority of the Court in *Thomas* v. *Quartermaine* (1), and with the construction they place on the Employers' Liability Act. That Act only removes such obstacles to a workman's right to sue as had been held to arise from the relation of master and servant. It leaves the doctrine of Volenti non fit injuria untouched. Now, as before the Act, to use the words of Bowen, L.J. (2), "one man cannot sue another in respect of a danger or risk not unlawful in itself that was visible, apparent, and voluntarily encountered by the injured person." The present case seems a stronger case of voluntary exposure to danger than that of *Thomas* v. *Quartermaine*. (1) In the latter case there is little if any evidence that Thomas knew of or appreciated the danger: but, in the present case, the evidence is strong to shew that Yarmouth thoroughly understood

(1) 18 Q. B. D. 685. (2) 18 Q. B. D. at p. 699.

1887

YARMOUTH v. FRANCE.

Lopes, L.J.

the danger to which he was exposing himself. With a knowledge of the danger, though complaining, he continues in the service, indicating thereby a willingness to incur the risk rather than give up his employment.

In my opinion, the case of *Thomas* v. *Quartermaine* (1) decides that every defence (except in specified cases the defence of "common employment") is still open to the employer: thus leaving the law, except in the case of "common employment" in the specified instances as it was laid down in *Woodley* v. *Metropolitan District Ry. Co.* (2) It was for the plaintiff here to make out that the defendant was negligent towards the plaintiff in conducting himself as admittedly he did. I can see no evidence of any negligence arising from any breach of duty which the defendant owed the plaintiff.

The plaintiff deposed that, when he complained, Tomlin told him to go on driving the horse, and that his employer would be responsible. There is no evidence that Tomlin was authorized by the defendant to make this statement. The judge below disregarded this evidence, and I think rightly: it was not admissible as evidence against the master (the defendant). I am unable to see any substantial difference between the present case and the cases to which I have referred: and I think the judge was right in giving judgment for the defendant.

I am also of opinion that the judge was right in holding that the plaintiff was a person to whom the Employers and Workmen Act, 1875, applied, and therefore in that respect entitled to sue under the Employers' Liability Act, 1880. The case of *Cook* v. *North Metropolitan Tramways Co.* (3) is an authority for this.

Holding as I do, it is unnecessary to decide whether a horse is "plant" within s. 1, sub-s. 1; for, assuming it in the plaintiff's favour, in my opinion he cannot recover. I wish to be understood as not expressing any opinion on this.

The appeal will therefore be allowed.

Appeal allowed.

Solicitor for plaintiff: *H. R. Newson.*

Solicitors for defendant: *Dawes & Sons.*

J. S.

(1) 18 Q. B. D. 685. (2) 2 Ex. D. 384. (3) 18 Q. B. D. 683.

[IN THE COURT OF APPEAL.]

1887
July 1, 9.

EX PARTE MOON. IN RE MOON.

Bankruptcy — Scheme of Arrangement — Default by Debtor — Injustice to Creditors — Adjudication of Bankruptcy — Jurisdiction — Discretion — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 11.

Sub-s. 11 of s. 18 of the Bankruptcy Act, 1883,—which provides that, if default is made in payment of any instalment due in pursuance of a composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme—applies to a case in which the debtor has in fact (though without any fraud) misled the creditors as to the value of his assets comprised in an assignment to a trustee for the creditors, and the creditors have consequently received a less dividend than the debtor led them to expect.

The Court will not exercise this discretionary power of adjudicating the debtor a bankrupt if it can see plainly that the creditors can gain nothing by an adjudication, but the Court will exercise the power if there is only a probability that the creditors will gain by an adjudication.

APPEAL against an order of the Salisbury County Court refusing to adjudicate W. Moon a bankrupt.

On January 20, 1885, Moon filed a bankruptcy petition in the Salisbury County Court. On February 23, 1885, the creditors at their first meeting resolved to accept, in satisfaction and discharge of the debts provable under the petition, a proposal made by the debtor to assign his property to a trustee to secure the payment of a composition of 20*s.* in the pound to his creditors, as embodied in a draft deed which was produced at the meeting. Moon then represented to the creditors that the value of his property was more than sufficient to pay the composition. The resolution was confirmed at the second meeting of the creditors, and was afterwards approved by the Court. The deed which was subsequently executed in pursuance of the resolutions bore date March 26, 1885, and was expressed to be made between Moon of the one part and F. A. Dawes (the trustee) of the other part. It contained recitals of the filing of the petition

1887

Ex parte Moon.
In re Moon.

and of the resolution, and also recitals to the effect that Moon was possessed of or entitled to the property specified in a schedule thereto, and that, in accordance with Moon's desire to pay his creditors 20*s.* in the pound, and in order that the composition should be secured, he had agreed with Dawes to assign to him all the property set forth in the schedule, upon the trusts hereinafter contained. The operative part of the deed witnessed that "for effectuating the said desire and in pursuance of the said agreement" Moon granted and conveyed to Dawes all and singular the property set forth in the schedule, and all the estate, &c. of Moon in, to, and upon the same, "*and all other the estate (if any) of the said William Moon,*" upon the trusts thereinafter declared.

The question was afterwards raised on behalf of the creditors whether a life interest in the income of a sum of £50,000, to which Moon was entitled under the trusts of a post-nuptial settlement, which he had executed on July 14, 1882, was included in the creditors' deed. This settlement had been executed under the following circumstances. Moon was under the will of his grandfather entitled to a share of the grandfather's residuary estate. In December, 1873, a suit was instituted in the Court of Chancery for the administration of the grandfather's estate. Moon was a defendant to the suit, and became under it a ward of Court. On September 1, 1881, he, being still under the age of twenty-one, married without the leave of the Court. On May 12, 1882, an order was made in the suit by Fry, J., that a petition should be presented under the Infants' Settlement Act (18 & 19 Vict. c. 43) for the settlement of a substantial portion of Moon's property. A petition was accordingly presented under which the settlement of July 14, 1882, was approved by the Court. The settlement contained a proviso that, if Moon should become bankrupt, or do or suffer anything whereby the income of the settled fund, if payable to him absolutely, or any part thereof, would become vested in any other person, then the trust thereinbefore declared in favour of Moon should, so far as the law would permit the same, cease, and during the remainder of Moon's life the trustees should have a discretion as to the application of the income for the benefit of Moon's wife and the issue

of the marriage. The Court of Appeal (affirming a decision of Cave, J.), held (17 Q. B. D. 275) that the life interest was not included in the creditors' deed.

[The provisions of that deed and of the forfeiture clause in the settlement are more fully stated in the former report.]

Part of the property comprised in the creditors' deed was realised by the trustee, and dividends to the amount of 12*s.* in the pound were paid to the creditors, and a sum sufficient to pay a further dividend of 2*s.* 6*d.* in the pound was in the hands of the trustee.

On July 5, 1886, an application was made to the county court by some of the creditors and the official receiver (who was also the trustee of the creditors' deed) for an order rectifying that deed, by including in it the life interest of Moon under the settlement, or in the alternative for an adjudication of bankruptcy against Moon under sub-s. 11 of s. 18 of the Bankruptcy Act, 1883. The county court judge refused the application altogether.

The applicants appealed to the Divisional Court.

Lockwood, Q.C., and *F. Cooper Willis*, for the appellants.
R. Vaughan Williams, and *Muir Mackenzie*, for Moon.

MATHEW, J. There can, I think, be no doubt that, when a debtor seeks to deprive his creditors of the benefits which the Bankruptcy Act is intended to secure to them, to induce them to take something less than the Act gives them, he is bound to shew that he has behaved with the utmost integrity and fairness and with entire good faith. [The learned judge stated the facts of the case, and continued:—] Under the circumstances it seems to me that our duty is perfectly plain. Sub-s. 11 of s. 18 is framed with the view of giving the Court control over arrangements of this sort in which it was likely that creditors might be misled, because it is impossible to conceive a position less advantageous for making a bargain than that under which an arrangement of this sort is agreed to. A debtor comes forward with a statement of the amount of his assets at a large meeting of creditors, many of them for very small amounts, and it is impossible for them fully to criticise and examine the statement thus laid before them. Everybody is

1887

Ex parte Moon.
In re Moon.

Mathew, J.

interested in making an end of the matter as soon as possible, and when such assurances are given as in this case, almost on the honour of those who give them, that the creditors are certain to be paid 20s. in the pound, the Court must watch with the greatest care and anxiety to see how these engagements have been entered into, and what expectation there could have been of their being carried out at the time when they were made. It seems to me that there was no justification whatever for the statement of his assets which this debtor laid before his creditors. I think the creditors were misled, and that there was such misrepresentation as must prevent this arrangement from being upheld in equity. I do not think it is necessary in cases of this kind to prove misrepresentation other than an innocent misrepresentation. Here there was a statement of what the debtor says he believed he was worth without his having, as it seems to me, any grounds for his belief. His statements were reckless, being made without knowledge that they were true, and, so far as appears, he did not consider whether they were true or not.

Casuists may make a distinction between an assertion known to be false, and an assertion not known to be true, but, where there has been an intentional departure from the truth, there is no legal distinction between the two. As I have already said, it does not appear to me necessary for our decision that we should arrive at a conclusion that the debtor knew his representations to be false. Assuming that the misrepresentations were innocent, it seems to me, that as they have misled the creditors, the bargain ought not to be upheld, and the debtor ought not to have the benefit of it. We must, therefore, adjudicate him a bankrupt.

Cave, J. I am of the same opinion. I think it very important that it should be generally known that, when a debtor lays a proposal before his creditors which cannot be fully investigated by them, and by which he asks them to accept something less than they are entitled to under the law of bankruptcy, he is bound to exercise the utmost good faith, and, if he makes any material representation which is not true in fact, the creditors are entitled to have the arrangement which is founded upon that incorrect representation set aside.

The debtor appealed to the Court of Appeal.

1887

Ex parte Moon.

In re Moon.

July 1. *R. Vaughan Williams*, and *Muir Mackenzie*, for the appellant. No doubt it was contemplated by all parties that the creditors would get 20*s.* in the pound, but the debtor entered into no covenant to pay that amount. No fraud is alleged against him. It is only said that the property comprised in the deed has not realized what was anticipated by both the debtor and the creditors, and that the creditors were misled by the reckless statements of the debtor. If it is so, still sub-s. 11 of s. 18 (1) of the Bankruptcy Act, 1883, does not apply to such a case. The object of such an arrangement is that the debtor should not be made a bankrupt. The mere deficiency in the expected value of the assets is not a "sufficient cause" within the meaning of sub-s. 11. Those words must be construed as referring to something ejusdem generis with what has been previously mentioned. There is no "injustice or undue delay to the creditors." They stipulated for the scheme of arrangement as carried out by the deed. "Default in the payment of any instalment" is expressly provided for by sub-s. 11. The inability of the debtor to pay might possibly be an injustice to the creditors, if he had agreed to make the payments within a specified time, but it is not so in a case like the present, where it is clear that the creditors took the risk themselves. The trusts of the deed are to pay the creditors 20*s.* in the pound out of the proceeds of the property comprised in it. The property was assigned to the trustee as the security for the 20*s.* in the pound. He was appointed by the creditors, and the administration of the property was given to

(1) Sub-s. 11 of s. 18, provides: "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section any debt provable in other respects, which has been contracted before the date of the adjudication, shall be provable in the bankruptcy."

1887

EX PARTE MOON. IN RE MOON.

him, not left to the debtor. Between the first and second meetings of the creditors the official receiver, who is the trustee under the deed, had a complete opportunity of investigating the value of the debtor's property. The evidence shews that each item was fully discussed by the creditors at the second meeting, and that they were told that, if they accepted the debtor's valuation and it should turn out to be excessive, their hands would be tied. It is clear that they were not misled, but knew that they were accepting the deed at their own risk.

[LORD ESHER, M.R., referred to *Ex parte McHenry*. (1)]

The creditors are not entitled to complain of any delay in the administration of the property which has been caused by the act of their own trustee. There is no "injustice" to them, unless it is an injustice caused by the debtor.

It is clear that the creditors were aware of the settlement, and that, if there were a bankruptcy, the debtor's life interest would be forfeited.

Lockwood, Q.C., and *F. Cooper Willis*, for the creditors. The object of sub-s. 11 is that, notwithstanding the acceptance of a composition or scheme by the creditors, the Court shall retain a control over the debtor's affairs. Primâ facie, if creditors enter into an agreement to accept the debtor's offer of 20*s.* in the pound, and they do not get the 20*s.*, there is an "injustice" to them. The fact of injustice may be disproved, but the onus of proof is on those who say that under such circumstances there is no injustice. The evidence of what took place at the first meeting shews that the creditors were asking for 20*s.* in the pound, and that the debtor's answer to them was, "You are going to have it."

[LORD ESHER, M.R. The power given to the Court by sub-s. 11 to adjudge the debtor bankrupt is a discretionary power; if by exercising it more harm would be done to the debtor than good to the creditors, ought the Court to exercise it? If the only result of an adjudication would be that the debtor's life interest under the settlement would be forfeited, so that the creditors would get nothing, why should an adjudication be made? Can the settlement be said to be a voluntary one, when it was made under the compulsion of an order of the Court of Chancery?]

(1) 24 Ch. D. 35.

The settlement provides that the trust in favour of the debtor shall cease in the event of his bankruptcy, only "so far as the law will permit the same." At any rate there is a strong probability that there are other assets to be got in, and the trustee ought to have an opportunity of making inquiries. The trustee in a bankruptcy would have the power of examination given by s. 27 of the Act, a power which the trustee under a scheme of arrangement has not: *Ex parte Whinney.* (1) The Court of Chancery cannot make a settlement of an infant's property so as to set aside the law of bankruptcy, and this settlement purports to be made only "so far as the law will permit."

R. Vaughan Williams, in reply. If the forfeiture clause in the settlement is bad at all, it is so, not by virtue of the bankruptcy law, but on the ground that it is fraudulent under the Statute of Elizabeth. For this purpose the settlement must have been voluntary, and it was not voluntary, because it was made in pursuance of the order of the Court of Chancery. That order negatives the existence of any fraudulent intention in the debtor: *Higinbothan* v. *Holme.* (2)

Cur. adv. vult.

July 9. Lindley, L.J. This is an appeal against an order of the Divisional Court adjudicating the debtor, William Moon, a bankrupt, and the questions we have to consider are, whether, having regard to the language of sub-s. 11 of s. 18 of the Bankruptcy Act, 1883, the Court has power to adjudicate him a bankrupt, and, if so, whether the case is one in which an adjudication ought to be made.

When the scheme of arrangement was presented to the creditors and accepted by them, it was represented to them by the debtor that the property to be transferred to the trustee, upon trust for sale and realization, was ample, and much more than ample, to produce 20*s.* in the pound, and I do not for a moment doubt that the debtor thought so. We are now told, and it is undeniable, that the property will not, in fact, realize enough by a considerable sum to pay 20*s.* in the pound. Under these circumstances the creditors are naturally disappointed, and in the

(1) 17 Q. B. D. 238. (2) 19 Ves. 88.

1887

EX PARTE MOON. IN RE MOON.

Lindley, L.J.

expectation or hope that they will be able to obtain a further dividend (they have already had a considerable dividend), they have made this application, and of course their object in making the debtor a bankrupt is to enable the trustee on their behalf to obtain a further dividend.

[The Lord Justice read sub-s. 11 of s. 18, and continued :—]

Now, no one charges the debtor with fraud : the case is not put upon the ground that the approval of the Court was obtained by fraud ; but it is the fact, and it is a very important fact, that the debtor did very greatly over-estimate the value of his assets. The value of the assets was very grievously exaggerated, and the creditors have not got, and cannot get, the dividend which was promised them. The first point that was urged on behalf of the debtor was, that, upon the true construction of the creditors' deed, or the fair view of the arrangement between the debtor and his creditors, the risk was thrown upon them. I cannot think that that is either the fair view or the legal effect of the deed. What was held out to the creditors (if we look at it apart from the mere terms of the deed) was this : "There is ample property to secure you 20*s.* in the pound ; you will have 20*s.* in the pound, and I will place property of a sufficient value in the hands of your trustee to secure you that payment." It is obvious that they proceeded upon the assumption that they were to have 20*s.* in the pound : that was the substance of it to them. Then, when you look at the deed, and see what the legal effect of it is, I cannot by any method of construing it find that the risk of obtaining the 20*s.* in the pound was thrown on the creditors. On the contrary, the recitals in the deed point quite the other way. I cannot, therefore, come to the conclusion that it was for the creditors to bear the risk, whether they should get 20*s.* in the pound or less, or that no injustice is done to them if they do get less. On the contrary, it appears to me that very grievous injustice is done to them if, owing to the exaggerated estimate placed before them of the value of the assets, their expectations thus raised by the debtor are disappointed.

Then it was urged that sub-s. 11 does not apply to a scheme of this kind—a scheme for payment of 20*s.* in the pound. I cannot accede to that view. The language is quite plain : "If default is

made in payment of any instalment due in pursuance of the composition or scheme." Then it was said that there is no default in payment of any instalment. That is quite true; it was not a scheme for payment in instalments; but it would be a very curious result if one of these arrangements could be upset because an instalment was in arrear, and another could not be upset because the whole payment was in arrear. There would be no common sense in that. But then the sub-section goes on: "Or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor." It appears to me that the present case comes distinctly within these words. It is, to my mind, "unjust" to the creditors that they should not have 20*s.* in the pound under the scheme; and, even if they get 20*s.*, it is unjust to delay them more than is absolutely necessary before they get the whole of the 20*s.*

I am of opinion that there is ample jurisdiction to set aside this scheme, and to order the debtor to be adjudicated a bankrupt.

Then comes the question whether, under the circumstances of the case, the Court ought to make an adjudication, and, in order to determine that, it appears to me that all we have to do is to make up our minds whether it is probable that anything will be got for the benefit of the creditors by making the debtor a bankrupt. If we could plainly see that there are no other assets which the creditors can get hold of, of course there would be no object in making the debtor a bankrupt, and the Court in the exercise of its discretion would probably decline to do so. But I cannot see that that is so in the present case. I am not prepared to say what advantage may or may not accrue to the creditors under an order for adjudication, but I am certainly not prepared to say that they will get nothing by it. On the contrary, I think they will very likely get something by it. At all events, I cannot come to the conclusion that nothing is to be got by it; and it appears to me that, having regard to the power given to the Court, and to the fact that we are unable to say that the creditors will get nothing by it, they are entitled to an adjudication.

1887

EX PARTE MOON. IN RE MOON.

I think, therefore, the decision of the Divisional Court ought to be upheld, and the appeal dismissed.

LOPES, L.J. I do not think that the debtor intended to mislead the creditors; but I am quite clear that he did greatly overestimate the value of his assets, and that he did in fact mislead his creditors into the belief that they would be paid 20s. in the pound.

If I thought that no good would result to the creditors by adjudicating the debtor a bankrupt, I should not think it desirable to make an adjudication. But I am not prepared to say that the creditors may not be in a better position if there is an adjudication than they would be under the present scheme. For anything I know (I express no opinion about it) they may be able successfully to question some of the provisions of the settlement. If that is so, it may be an "injustice to the creditors" not to make the debtor a bankrupt; and the case comes within subs-s. 11 of s. 18 of the Bankruptcy Act. I think that the Divisional Court was right in adjudicating the debtor a bankrupt, and that the appeal should be dismissed.

LINDLEY, L.J. The Master of the Rolls has requested me to say that he takes the same view.

Appeal dismissed.

Solicitor for debtor: *E. A. Nelson.*
Solicitors for creditors: *Dawes & Sons.*

W. L. C.

[IN THE COURT OF APPEAL.]

1887
July 22.

EX PARTE SAYER. IN RE MANSEL.

Bankruptcy—Liquidation by Arrangement—Power of Court to restrain Creditors from holding a Meeting to remove the Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 65, 72, 83 (4).

By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 83, sub-s. 4 (which corresponds to s. 86, sub-s. 1, of the Bankruptcy Act, 1883), "the creditors of a bankrupt may by special resolution at a meeting specially called for that purpose, of which seven days' notice has been given, remove the trustee and appoint another person to fill his office":—

Held, that the Bankruptcy Court had power under ss. 65 and 72 of the Act to restrain the creditors from holding a meeting convened to consider the removal of the trustee of a liquidating debtor until after a question as to expunging the proof of a creditor had been decided.

APPEAL against an order made by the registrar restraining the creditors of Sir Richard Mansel, a liquidating debtor, from holding a meeting, which had been called for May 16, 1887, or from convening or holding any other meeting, for the purpose of considering the removal of J. J. Saffery from the office of trustee in the liquidation, and appointing some other person in his place, and from passing any resolution thereat as to such removal until after the determination of a motion of the trustee to expunge or modify the proof of Charles Norton.

The debtor filed a liquidation petition under the Bankruptcy Act, 1869, on June 26, 1883. The creditors resolved on a liquidation by arrangement, and Saffery was appointed trustee. The number of creditors who had proved debts in the liquidation was thirty-six, and their proofs were for sums which amounted altogether to 11,625*l.* 18*s.* 4*d.* The largest proof was by Norton, for 8498*l.* 7*s.* 2*d.* Saffery, as trustee, having given the notice of motion to expunge Norton's proof, certain creditors, who had bought up Norton's debt, and who represented more than one-fourth in value of the creditors, issued a notice dated May 7, 1887, summoning a general meeting of the creditors to be held on May 16, 1887, to consider the removal of Saffery from the office of trustee and the appointment of another person to fill

1887

Ex parte Sayer.
In re Mansel.

the office. This notice was given under r. 305 of the Bankruptcy Rules, 1870.

The registrar having granted the injunction, one of the creditors who had called the meeting appealed.

Cooper Willis, Q.C., and *R. Vaughan Williams*, for the appellant. The registrar had no jurisdiction to restrain the creditors from holding the meeting. Sub-s. 4 of s. 83 (1) of the Bankruptcy Act, 1869, under which Act these proceedings were commenced, gives the creditors an absolute power of removing a trustee, whereas the court can only remove a trustee "upon cause shewn."

If there is jurisdiction no sufficient ground has been shown for its exercise.

Everitt, Q.C., and *Henry Kisch*, for the trustee. Under ss. 65 and 72 (2) of the Bankruptcy Act, 1869, or one of them, there is

(1) Sect. 83, sub-s. 4: "The Court may, upon cause shewn, remove any trustee. The creditors may, by special resolution at a meeting specially called for that purpose, of which seven days' notice has been given, remove the trustee, and appoint another person to fill his office, and the Court shall give a certificate declaring him to be trustee."

Rule 307 of the Bankruptcy Rules, 1870 (which is one of the rules relating to proceedings for liquidation by arrangement or composition with creditors), provides: "A trustee may be removed by a special resolution of the creditors assembled at a general meeting summoned for the purpose, and another trustee may be appointed in his place by a majority in value of the creditors then present or represented."

Sub-s. 1 of s. 86 of the Bankruptcy Act, 1883, is almost identical in its terms with sub-s. 4 of s. 83 of the Bankruptcy Act, 1869.

By sub-s. 1 of s. 93 of the Bankruptcy Act, 1883, the jurisdiction of the London Bankruptcy Court is transferred to the High Court of Justice.

(2) By the Bankruptcy Act, 1869, s. 65: "The London Court of Bankruptcy shall continue to be a Court of Law and of Equity and a principal Court of record, and the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any judge of Her Majesty's Superior Courts of Common Law at Westminster, or by any judge of Her Majesty's High Court of Chancery, and the orders of such judge shall be of the same force as if they were judgments in the Superior Courts of Common Law, or decrees in the High Court of Chancery."

Sect. 67 empowers the Chief Judge in Bankruptcy, "Subject and in accordance with the rules of court for the time being in force," to delegate to the registrar of his court "such of the powers vested in him by this Act as it may be expedient for the judge to delegate to him."

By s. 72: "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether

jurisdiction to make the order, and the Court has also an inherent power to prevent injustice.

[They were stopped by the Court.]

LORD ESHER, M.R. The first question is, whether the registrar had jurisdiction to restrain the creditors from holding the proposed meeting. The order did not restrain them absolutely; but only until the question of the validity of Norton's debt, which was already before the Court, should have been determined. Whether the registrar could restrain the creditors from holding such a meeting for ever is not the question; the question is, whether he had jurisdiction to restrain them from holding the meeting until the validity of a debt which was already sub judice should have been determined. In order to test the jurisdiction we are entitled to take an extreme case. Suppose a man, who alleged that he was a creditor for an amount exceeding the debts of all the other creditors, had really no debt at all, he would be able to overpower all the other creditors and himself call a meeting to remove the trustee who was seeking to expunge his debt. The appellants must argue that, even in such a case as that, where the greatest inconvenience and injustice would arise, the Court would have no jurisdiction to make such an order as the registrar has made. It appears to me that jurisdiction to make the order is given by ss. 65 and 72 of the Bankruptcy Act, 1869. If the holding of this meeting would work injustice, s. 72 gives jurisdiction to make the order, the effect of which is practically to postpone the holding of the meeting till the question of the debt shall have been decided. Sect. 65 too is enough to give the jurisdiction, for the Court of Chancery would have had jurisdic-

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of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

By sub-s. (1) of s. 94 of the Bankruptcy Act, 1883: "all matters pending in the London Bankruptcy Court at the commencement of this Act . . . . shall be assigned to such Division of the High Court as the Lord Chancellor may from time to time direct;" and by sub-s. (2) all the matters assigned "shall be ordinarily transacted and disposed of by and under the direction of one of the judges of the High Court, and the Lord Chancellor shall from time to time assign a judge for that purpose."

1887

Ex parte Sayer. In re Mansel.

Lord Esher, M.R.

tion to make such an order under such circumstances. I think it is clear that the registrar had jurisdiction.

Has the registrar then exercised his jurisdiction rightly under the circumstances? The debts proved by the creditors amount altogether to 11,625*l.*, of which 8,498*l.* is claimed to be due to Norton. The question is before the Bankruptcy Court for determination, whether the whole or any part of that sum is really due to Norton, and his claim has been bought by the creditors who have called the meeting to remove the trustee. Can any one who understands how matters are managed in the Court of Bankruptcy—where it seems to be the practice for people never to act in their own names, and everything is done underboard, not aboveboard—help seeing that it is to the interest of those creditors that Norton's claim should not be investigated? They would receive the dividend upon it, if the proof stands. Was not the registrar right in feeling a strong suspicion that the object of the meeting was to obtain the appointment of a favourable trustee who, without regarding the interests of the other creditors, would pass lightly over the objections to Norton's claim, and in preventing them from doing this until the validity of his claim should have been determined? The hearing of the motion to expunge his proof being fixed, as we have been told, for next Monday, and those creditors who have bought his claim being practically his masters, so that he will appear or not according to their directions, I think the registrar would have been foolish indeed if he had not made this order.

Lindley, L.J. The question of substance may be shortly disposed of. On April 25 the trustee gave notice of a motion to expunge Norton's proof. Then on May 7 a notice calling a meeting of creditors to consider the removal of the trustee was issued by the persons who have bought up Norton's claim. One must indeed be blind if one did not see that the object of this was to prevent the investigation of Norton's claim. The registrar has made an order restraining the holding of this meeting until after the determination of the motion to expunge Norton's proof, and, if there was jurisdiction to make that order, it is abundantly plain that it ought to have been made. I think there was jurisdiction

either under s. 72, or under s. 65, or under both those sections, and that the registrar was right in finding some way of checkmating such dishonest proceedings.

LOPES, L.J. When the facts are understood there is no difficulty in deciding this case. These creditors have a trustee whom they do not like, and they want to get another who will be more favourable to the admission of Norton's claim. If the registrar had jurisdiction to make the order, no honest person can doubt that he was right in making it. In my opinion there was jurisdiction either under s. 72, or under s. 65, and the order was rightly made.

Solicitors for appellants: *Ellis, Munday, & Bartrum.*
Solicitors for trustee: *Beyfus & Beyfus.*

W. L. C.

REG. *v.* POOLE.

IN this case (reported, ante, p. 602) the judges who decided it, Lord Coleridge, C.J., and Denman, J., wish it to be stated that when they expressed their view of the proper interpretation to be placed on the words of 14 & 15 Vict. c. 100, s. 24, they were unaware that it had been otherwise interpreted by the House of Lords in *Reg.* v. *Castro.* (1) Had that decision of the House of Lords been in their minds it would have been their duty to defer to it, whatever might have been their own view of the words of the statute independent of authority. That portion of their judgment, therefore, which conflicts with the decision of the House of Lords must be considered as not law.

(1) 6 App. Cas. 229.

END OF VOL. XIX.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1888, will be as follows:—

In the First Series,
37 Ch. D.

In the Second Series,
20 Q. B. D. 13 P. D.

In the Third Series,
13 App. Cas.

INDEX.

ACCOUNT—Part of matter in dispute—Matter of mere account—Power to refer compulsorily all issues - - - 296
See PRACTICE. 12.

ACCOUNT BOOKS—Order for discharge—Bankruptcy - - - - 102
See BANKRUPTCY. 12.

ACQUITTAL — Indictment—Power to stay proceedings—Fresh indictment - 590
See BRIDGE.

ADMINISTRATION —Bankruptcy—Administration of estate of deceased insolvent 92
See BANKRUPTCY.

ADMIRALTY — Collision—Action under 50*l.*—Jurisdiction - - - - 428
See COUNTY COURT.

ADULTERATION—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Tincture of Opium—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 15—*British Pharmacopœia—Standard of Quality of Drugs.*] Upon a complaint under s. 6 of the Food and Drugs Act, 1875, for selling tincture of opium which was not "of the nature, substance, or quality" of the article demanded by the purchaser, it appeared that the drug, which was sold as "tincture of opium" by the defendant, was deficient in opium to the extent of one third and in alcohol to the extent of nearly one half as compared with the standard prescribed by the British Pharmacopœia:—*Held*, that the defendant was liable to be convicted, although the purchaser had not specifically asked for tincture of opium "prepared according to the recipe in the British Pharmacopœia" WHITE *v.* BYWATER - 582

—— Dilution of beer by publican—Excise 524
See REVENUE. 5.

ADULTERY—Liability of husband for necessaries supplied to wife—Connivance by husband - - - - - 379
See HUSBAND AND WIFE.

ADVERTISEMENT — Advertising hoardings — Occupation—Liability to be rated 288
See POOR-RATE. 2.

ALDERMAN—Election—Mayor elect voting for alderman—Void election - - 498
See MUNICIPAL CORPORATION. 2.

AMENDMENT — Statement of claim — Claim barred by Statute of Limitations 394
See PRACTICE.

—— Indictment—Form of - - 602
See HIGHWAY.

ANNUAL VALUE — Income tax — Tithe rentcharge - - - - 442
See REVENUE. 7.

APPEAL—Stay of execution pending appeal to House of Lords—Application, where to be made - - - - 83
See PRACTICE. 2.

—— Interpleader—Decision in a summary manner - - - - - 139
See PRACTICE. 8.

—— Locus standi—Person aggrieved — Official receiver—Refusal of application for adjudication of bankruptcy on non-approval of scheme of arrangement - 174
See BANKRUPTCY. 2.

—— Bankruptcy—Board of Trade—Order of discharge—Validity of rule - - 182
See BANKRUPTCY. 3.

—— Mayor's Court—Claim over 20*l.*—Leave to appeal - - - - 210
See MAYOR'S COURT.

—— County Court—Remitted issue—New trial
See PRACTICE. 7. [522

—— County Court—Time for appealing—Motion for new trial - - - 151
See PRACTICE. 3.

ARBITRATION—Railway company—Agreement confirmed and made binding by and scheduled to private Act—Jurisdiction of Railway Commissioners - 540
See RAILWAY COMPANY.

ARRANGEMENT — Bankruptcy — Default by debtor—Adjudication of bankruptcy—Discretion - - - - 669
See BANKRUPTCY. 15.

—— Scheme of—Approval of Court—Reasonableness—Benefit of creditors - 33
See BANKRUPTCY. 14.

BALLOT—Returning officer—Parliamentary election—Charge for storing ballot-boxes
See PARLIAMENT. [252

BANKRUPTCY—*Administration of Estate of deceased Insolvent—Avoidance of Voluntary Settlements—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 47, 125.] Sect. 47 of the Bankruptcy Act, 1883, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy under s. 125 of the Act.—Decision of Cave, J., affirmed. Ex parte Official Receiver. In re Gould [C. A. 92

2. —— *Appeal—Locus Standi—"Person aggrieved"—Official Receiver—Refusal of Application for Adjudication of Bankruptcy on non-approval of Scheme of Arrangement—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 104, 105, 109—*Bankruptcy Rules*, 1886, *r.* 191.] When an application made by the official receiver under s. 20 of the Bankruptcy Act, 1883, and rule 191 of the Bankruptcy Rules, 1886, for an immediate adjudication of bankruptcy against a debtor, on the non-approval of a scheme of arrangement, has been refused or adjourned, the official receiver is a "person aggrieved" by the order, and as such is entitled to appeal against it.—So *held*, by Lord Esher, M.R., and Lopes, L.J. (Fry, L.J., dissenting). Ex parte Official Receiver. In re Reed, Bowen & Co. - - - C. A. 174

3. —— *Appeal—Board of Trade—Order of Discharge—Validity of Rule—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 127—*Bankruptcy Rules*, 1886, *r.* 237.] Rule 237 of the Bankruptcy Rules, 1886, which gives the Board of Trade a right to appeal from an order of discharge where the official receiver has reported facts which would justify the refusal of an unconditional discharge, is a rule for carrying into effect the objects of the Bankruptcy Act, 1883, within the meaning of s. 127, and is therefore valid. In re Stainton. Ex parte Board of Trade - - 182

4. —— *Practice—Creditor's Petition—Death of Debtor before Service of Petition—Substituted Service—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 108—*Bankruptcy Rules*, 1886.] Where a debtor against whom a creditors' petition in bankruptcy has been presented dies before service of the petition upon him, there is no power under s. 108 of the Bankruptcy Act, 1883, or the Bankruptcy Rules, to dispense with service or to order substituted service of the petition, and the bankruptcy proceedings must necessarily be stayed. In re Easy. Ex parte Hill and Hymans [C. A. 538

5. —— *Evidence—Bankrupt's Public Examination.*] The answers of a bankrupt on his public examination are not admissible in evidence in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt. In re Brunner - - - - - 572

6. —— *Realization of Debtor's Property—Duties of Debtor—Insurance on Bankrupt's Life—Submission to Medical Examination—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24, 28.] The principal asset of a bankrupt was a contingent reversionary interest which was only saleable if the bankrupt's life was insured. The trustee requested the bankrupt to submit to a medical examination with a view to a policy being effected. This the bankrupt refused, although

BANKRUPTCY—*continued.*

he had not long before submitted to such an examination with a view to raising money on his interest, and although in his public examination he said that since then he had contracted no disease, and that he knew of no reason why he should not submit to examination. The registrar having declined to treat this refusal as misconduct which he could take into consideration in determining whether the discharge of the bankrupt should be suspended or refused under s. 28 of the Bankruptcy Act, 1883, on appeal:—*Held*, by Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), that taking the necessary steps to effect such an insurance was not an act in relation to his property or the distribution of the proceeds which the bankrupt could be required to do under s. 24 of the Bankruptcy Act, 1883, and that the refusal to do so was therefore not misconduct on his part.—By Fry, L.J., that the acts which the bankrupt was required to do were in relation to his property and its distribution, and that the facts shewed that the request was reasonable.—*In re Garnett, Ex parte Bullock* (16 Q. B. D. 698), affirmed. In re Betts. Ex parte Board of Trade - - - - C. A. 39

7. —— *Statement of Affairs—Estoppel.*] The plaintiff gave a bill of sale on his furniture to the defendants to secure an advance. Before the payment of the first instalment due under the bill of sale he filed a petition in bankruptcy, and in his statement of affairs returned the defendants as secured creditors. The defendants seized and sold the furniture, and the proceeds being insufficient to pay their debt they proved for the residue. A composition of 2*s.* 6*d.* in the pound was proposed, and on the report of the official receiver was sanctioned by the Court and paid to the creditors, including the defendants. The plaintiff subsequently brought an action for the wrongful seizure of his goods, alleging that the bill of sale was invalid:—*Held*, reversing the judgment of Pollock, B., that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in this action. Roe *v.* The Mutual Loan Fund [C. A. 347

8. —— *Interpleader—Completion of Execution—"Seizure and Sale"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45, *sub-ss.* 1, 2; *s.* 46, *sub-s.* 2.] Goods of the debtor were taken in execution by the plaintiff under a judgment for a sum exceeding 20*l.* The goods having been claimed by a third person, an interpleader order was made on March 16 directing that, unless payment were made or security given by the claimant according to the provisions of the order, the sheriff should sell the goods and pay the proceeds of the sale into court. The claimant did not comply with the provisions of the order, and ultimately withdrew his claim. On March 28 the goods were sold and the proceeds paid into court on April 6. On April 7 notice of a bankruptcy petition having been presented against the debtor was served on the sheriff, and the debtor was adjudged bankrupt on such petition;—*Held*, that under ss. 45 and 46 of the Bankruptcy Act, 1883, the trustee in bank-

BANKRUPTCY—*continued.*

ruptcy of the debtor was entitled as against the plaintiff to the money in court. HEATHCOTE *v.* LIVESEY - - - - - 285

9. —— *Husband and Wife—Loan by Wife to Partnership in which Husband a Partner—Bankruptcy of Partnership—Wife's Proof against Joint Estate—Married Women's Property Act*, 1882, *s.* 3.] By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3, any money of a wife lent by her to her husband for the purpose of any trade or business carried on by him shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount of such money after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied:—*Held*, that where a wife lends her money to a trading partnership, of which her husband is a member, she is, notwithstanding the section, entitled to prove, on the bankruptcy of the partnership, against the joint estate in competition with other creditors. IN RE TUFF. EX PARTE NOTTINGHAM - - - - - 88

10. ——*Breach of Trust—Partnership—Joint and several Contract—Joint and separate Proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37; *Sched. II., r.* 18.] Trust funds were handed by the trustees for investment to a firm in which one of the trustees was a partner. These funds were misappropriated by the firm, who subsequently became bankrupt:—*Held*, that the trustees could, under Sched. II., r. 18, prove for the amount so misappropriated both against the joint estate of the firm and also against the separate estate of the defaulting trustee. IN RE PARKERS. EX PARTE SHEPPARD - - - - - - 84

11. —— *Avoidance of Voluntary Settlement executed by Bankrupt—Retrospective Effect of Act—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 47, 169.] Sect. 47 of the Bankruptcy Act, 1883, which avoids certain voluntary settlements executed by a bankrupt, is not retrospective (i.e. does not apply to settlements executed before the Act came into operation) so far as its provisions differ from those of s. 91 of the Bankruptcy Act, 1869. Therefore it does not apply to a settlement executed by a non trader before the Act came into operation, and the provision that a settlement executed within ten years before the bankruptcy of the settlor shall be void as against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the interest of the settlor in the settled property had passed to the trustees of the settlement on the execution thereof, does not apply to any settlements executed before the Act came into operation.—Per Lord Esher, M.R., and Lopes, L.J. Sect 47 is retrospective so far as it is a re-enactment of s. 91 of the Bankruptcy Act, 1869.—Per Fry, L.J. Quære, whether s. 47 is retrospective at all.—In 1877 a trader executed a voluntary which recited that he desired to settle certain shares in a company, upon the trusts therein declared for the benefit of his wife, himself, and his children, and that he was about to transfer the shares into the names of two persons therein named as trustees. And it was agreed that the trustees should stand possessed of the shares, so soon as the same should be transferred to them, upon trust to pay the dividends to the wife during her life, for her separate use without power of anticipation, and after her death upon certain trusts for the benefit of the settlor, and the issue of the marriage. The deed did not contain any covenant by the settlor to transfer the shares to the trustees. At the date of the deed the shares were standing in his name. On its execution the certificates were handed over to the trustees, who shortly after gave notice of the deed to the company. The settlor continued to receive the dividends as he had done before, and applied them to his own use. In 1886 he transferred the shares into the names of the trustees, and was soon afterwards adjudicated a bankrupt:—*Held*, by Lord Esher, M.R., and Lopes, L.J., that the deed of 1877, inasmuch as it imposed no legal obligation on the settlor with regard to the shares, was not a "settlement" within the meaning of s. 47.—But *held*, by all the Court, that the transfer of the shares to the trustees in 1886 was a "settlement" within s. 47, and that, being voluntary, and made after the Act came into operation, and within two years before the adjudication of bankruptcy, it was void as against the trustee in the bankruptcy.—Decision of Cave, J., affirmed. EX PARTE TODD. IN RE ASHCROFT - - - C. A. 186

12. —— *Order of Discharge—Omission to keep "usual and proper books of account"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3.] By s. 28 of the Bankruptcy Act, 1883, it is provided that the Court shall refuse a bankrupt an order of discharge, or suspend the operation of the order, or grant a conditional order, upon proof "that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy."—A bankrupt, who carried on business as a hatter, bought some houses with the intention of selling them at a profit for building purposes, and also incurred liabilities in promoting an hotel company. He had kept proper books of account in relation to his business as a hatter, but he had kept no books in respect of his purchase of houses or of his transactions in relation to the hotel company:—*Held*, by the majority of the Court of Appeal (Lord Esher, M.R., and Lopes, L.J.), affirming the judgment of the Queen's Bench Division, that the bankrupt was not required to keep any books relating to the building speculations, and that the omission to keep such books could not be taken into account as a reason for refusing or suspending his order of discharge:—By Fry, L.J., that the building speculations were "business" transactions, and that the bankrupt was bound to keep books in relation to them. EX PARTE BOARD OF TRADE. IN RE MUTTON [C. A. 102

13. —— *Liquidation by Arrangement—Power of Court to restrain Creditors from holding a Meeting to remove the Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 65, 72, 83 (4).] By the Bankruptcy Act, 1869 (32 & 33 Vict.

BANKRUPTCY—*continued.*

c. 71), s. 83, sub-s. 4 (which corresponds to s. 86, sub-s. 1, of the Bankruptcy Act, 1883), "the creditors of a bankrupt may by special resolution at a meeting specially called for that purpose, of which seven days' notice has been given, remove the trustee and appoint another person to fill his office":—*Held*, that the Bankruptcy Court had power under ss. 65 and 72 of the Act to restrain the creditors from holding a meeting convened to consider the removal of the trustee of a liquidating debtor until after a question as to expunging the proof of a creditor had been decided. Ex parte Sayer. In re Mansel - C. A. 679

14. —— *Scheme of Arrangement—Approval of Court—Reasonableness—Benefit of Creditors—Attempt to give Trustee under Scheme Powers of Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 27.] A scheme of arrangement of the affairs of a debtor provided that his property which would become divisible among his creditors, if he were adjudged a bankrupt, should vest in a trustee to be appointed by the creditors, and that the trustee should administer the property under the supervision of a committee of inspection in the like manner, and with the like powers and duties, and subject to the like conditions in all respects, as though the debtor had been adjudged bankrupt, and the trustee had been appointed trustee in the bankruptcy; and that the provisions of s. 27 of the Bankruptcy Act, 1883, relating to the discovery of the property of a bankrupt, should, so far as the same were applicable, apply to the proceedings under the scheme:—*Held*, that, inasmuch as s. 27 does not apply to a scheme of arrangement under s. 18, and cannot by agreement between a debtor and his creditors be incorporated in such a scheme, the scheme gave the creditors no greater advantage than they would have had in a bankruptcy, while it deprived them of some of the powers which they would have had, and of the control of the Court in the administration of the estate. That, consequently, the scheme was neither reasonable nor calculated to benefit the general body of creditors, and ought not to be approved by the Court. Ex parte Bischoffsheim. In re Aylmer - - - - C. A. 33

15. —— *Scheme of Arrangement—Default by Debtor—Injustice to Creditors—Adjudication of Bankruptcy — Jurisdiction — Discretion —Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 11.] Sub-s. 11 of s. 18 of the Bankruptcy Act, 1883,—which provides that, if default is made in payment of any instalment due in pursuance of a composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme—applies to a case in which the debtor has in fact (though without any fraud) misled the creditors as to the value of his assets comprised in an assignment to a trustee for the creditors, and the creditors have consequently

BANKRUPTCY—*continued.*

received a less dividend than the debtor led them to expect.—The Court will not exercise this discretionary power of adjudicating the debtor a bankrupt if it can see plainly that the creditors can gain nothing by an adjudication, but the Court will exercise the power if there is only a probability that the creditors will gain by an adjudication. Ex parte Moon. In re Moon [669

—— Examination before Court—Perjury—Absence of registrar during examination *See* Criminal Law. 2. [213

BARGE—Dumb barge—Registration as bill of sale - - - - - - 200 *See* Bill of Sale. 2.

BEER—Dilution by publican—Excise - 524 *See* Revenue. 5.

—— Licensing Acts—Intoxicating liquor—Sale of in marked measure - - - 478 *See* Licensing Acts.

BILL OF EXCHANGE—*Acceptance—Bill drawn on Firm—Acceptance in Name of Individual—Principal and Agent—Authority to accept.*] The defendant, a partner in a firm of C. Brothers, agreed with her co-partner that the partnership should be dissolved, that the affairs of the firm should be liquidated by an agent, who should realize the assets and pay the creditors, and that the business should thereafter be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account, signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers, and accepted by the agent in the names of the defendant and himself, and honoured. The defendant knew nothing of these cheques and bills.—The plaintiff sued as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened:—*Held*, that the agent had no authority to accept the bill in the defendant's name, so as to bind her, and that, not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable. *Kirk* v. *Blurton* (9 M. & W. 284) commented on and distinguished. Odell *v.* Cormack - - 223

—— Sale of goods—Bill given for price—Unsatisfied judgment on bill — Action against joint contractor for price—Res judicata - - - - 229 *See* Partnership.

BILL OF LADING—Estoppel—Quantity of goods shipped - - - - - 333 *See* Ship.

BILL OF SALE—*Schedule—Inventory—Chattels "specifically described"—Sufficiency of Description—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.] By s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, every bill of sale is void, except as against the grantor, in respect of chattels not specifically described in the schedule thereto annexed.—A bill of sale

BILL OF SALE—*continued.*

purported to assign "all and singular the several chattels and things specifically described in the schedule hereto annexed."—The description was, "four hundred and fifty oil paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames":—*Held*, that the chattels were not "specifically described," and therefore the bill of sale was void in respect of them.—*Roberts* v. *Roberts* (13 Q. B. D. 794) distinguished. Witt *v.* Banner - 276

2. —— *Ship or Vessel—Dumb barge—Assignment—Registration as Bill of Sale—Bills of Sale Act*, 1878 *and* 1882 (41 & 42 *Vict. c.* 31), *s.* 4, *and* (45 & 46 *Vict. c.* 43), *s.* 3.] A dumb barge, propelled by oars, plying on the River Thames and carrying goods, wares, and merchandize (without passengers) is a vessel within the exception of the Bills of Sale Acts, 1878 and 1882, which excepts from registration as a bill of sale transfers or assignments of a ship or vessel or any share thereof. Gapp *v.* Bond - - - - C. A. 200

3. —— *Validity — Registration — Promissory Note forming part of the Contract—Defeasance—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10.] By a bill of sale, drawn in accordance with the form in the schedule of the Bills of Sale Act, 1882, and duly registered, the grantor assigned certain specified chattels to secure to the grantees the repayment of a sum of 80*l.*, and interest thereon at 30 per cent.; the principal sum to be paid, together with the interest then due, by equal monthly payments of 5*l.* 6*s.* on specified days until the whole sum and interest should be fully paid. The grantor at the same time gave a separate promissory note bearing the same date as the bill of sale, promising to pay the grantees, or order, 95*l.* 12*s.*, by equal monthly instalments of 5*l.* 6*s.* payable on the same days as the monthly payments in the bill of sale, until the whole sum of 95*l.* 12*s.* should be fully paid; and the note contained a stipulation that in case of default in payment of any instalment the whole of the same sum should become due and payable:—*Held* (affirming the decision of the Queen's Bench Division), that by reason of this stipulation the promissory note was a defeasance of the bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, because if at any time the whole sum payable on the note were paid, the rights of the grantees under the bill of sale would cease, and therefore the bill of sale was void. Counsell *v.* London and Westminster Loan and Discount Company - - - - C. A. 512

4. —— *Statutory Form — Power of Sale — Power to charge Expenses on proceeds of Sale—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19–21.] A bill of sale, which contained an express power of seizure and sale, provided that the mortgagee should out of the moneys to arise from any such sale as aforesaid in the first place pay "the expenses attending such sale or otherwise incurred in relation to this security":—*Held*, that the bill of sale was void as not being in conformity with the statutory form given by the Bills of Sale Act, 1882.—The provisions of the Conveyancing Act, 1881, with

BILL OF SALE—*continued.*

regard to power of sale are not incorporated by the statutory form given by the Bills of Sale Act, 1882.—*Ex parte Official Receiver, In re Morritt* (18 Q. B. D. 222), and *Watkins* v. *Evans* (18 Q. B. D. 386), discussed. Calvert *v.* Thomas [C. A. 204

5. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Statutory Form, Deviation from—Covenant to pay Interest on Mortgages of Premises—Provision as to Possession of Instrument after Payment of Sums secured.*] A bill of sale given as a security for the payment of money contained a covenant for the payment by the grantor of all interest on mortgages, if any, of the premises on which the goods assigned were or to which they might be removed, and also a stipulation that, as soon as the sums secured were satisfied, the grantee would give a receipt in full of all demands and indorse a copy of the same on the bill of sale, but the bill of sale and any documents signed by the grantor or any other person in relation to the loan should remain in the custody and be the property of the grantee:—*Held*, that both of these stipulations were deviations from the statutory form given by the Bills of Sale Act, 1882, and that the bill of sale was therefore void. Watson *v.* Strickland - C. A. 391

—— Debenture — Interpleader — "Covering" deed - - - - - 568
See Company.

—— Power to have goods valued and purchase them—Term for maintenance of security
See Practice. 8. [139

BOARD OF TRADE — Bankruptcy—Appeal—Order of discharge—Validity of rule
See Bankruptcy. 3. [182

BOROUGH—Opposition to bill in Parliament—Poll—Obligation of town council to keep register of owners and proxies - 22
See Municipal Corporation.

BRIDGE—*County, Liability of, to repair—Bridge not built in existing Highway—Acquiescence by County, Evidence of — Statute of Bridges* (22 *Hen.* 8, *c.* 5)—*Indictment—Practice—Verdict of Acquittal—Motion for New Trial by Prosecution.*] Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to and the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county.—*Reg.* v. *Inhabitants of the County of Southampton* (17 Q. B. D. 424) in part dissented from.—Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted; but under very special circumstances the Court may order all proceedings upon the judgment to be suspended, so as to give an oppor-

BRIDGE—*continued.*
tunity for the question to be again raised upon a fresh indictment.—*Rex* v. *Wandsworth* (1 B. & Ald. 63) approved. THE QUEEN *v.* INHABITANTS OF THE COUNTY OF SOUTHAMPTON - - - 590

CARRIER—*Measure of Damages—Delay in delivery of Samples—Loss of Season.*] A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time:—*Held* (affirming the judgment of Day, J.), that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. SCHULZE *v.* GREAT EASTERN RAILWAY COMPANY C. A. 30

2. —— *Railway Company—Passenger's Luggage—Special Contract—Conditions of non-liability—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.] The plaintiff was a season ticket holder on the defendants' line from B. to K. under a special contract, by which he undertook to abide by all the rules, regulations, and bye-laws of the defendants. One of such regulations was that the defendants would not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner. The plaintiff having with him at B. a bag which was not so addressed saw it labelled for K. by one of the defendants' servants; he left the train at C., an intermediate station, and proceeded to K. by a subsequent train; on his arrival at K. his bag was missing. There was no evidence that the bag ever reached K.—*Held*, that the regulation of the defendants was not a just and reasonable condition within *s.* 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and could not be enforced against the plaintiff:—*Quære*, whether the liability of the defendants in respect of the portion of the journey from C. to K. was that of common carriers or merely of gratuitous bailees. CUTLER *v.* NORTH LONDON RAILWAY COMPANY - 64

—— Ship—Improper navigation - - - 242
See INSURANCE, MARINE.

CASE—Power of justices to state a special case under Summary Jurisdiction Act, 1879—Application not in writing - 163
See JUSTICES.

CASES—*Barnes* v. *Toye* (13 Q. B. D. 410) approved - - - - - 509
See INFANT.

—— *Berdan* v. *Greenwood* (Law Rep. 3 Ex. D. 251) followed - - - 170
See COUNTY COURT. 2.

—— *Blackburn Benefit Building Society* v. *Cunliffe, Brooks, & Co.* (22 Ch. D. 61) discussed - - - - - 155
See PRACTICE. 13.

CASES—*continued.*
—— *Dean* v. *Green* (Law Rep. 8 P. D. 79) followed - - - - 307
See ECCLESIASTICAL LAW.

—— *Drake* v. *Mitchell* (3 East, 251) distinguished
See PARTNERSHIP. [229

—— *Garnett, In re, Ex parte Bullock* (16 Q. B. D. 698) approved - - - 39
See BANKRUPTCY. 6.

—— *Kendall* v. *Hamilton* (4 App. Cas. 504) discussed - - - - 229
See PARTNERSHIP.

—— *Kingsbridge Union, Guardians of* v. *Guardians of East Stonehouse* (18 Q. B. D. 528) discussed and approved - 385
See POOR LAW.

—— *Kirk* v. *Blurton* (9 M. & W. 284) commented on and distinguished - - 223
See BILL OF EXCHANGE.

—— *Maidstone Union, Guardians of* v. *Guardians of Holborn Union* (17 Q. B. D. 817) discussed and approved - - 385
See POOR LAW.

—— *Official Receiver, Ex parte, In re Morritt* (18 Q. B. D. 222) discussed - 204
See BILL OF SALE. 4.

—— *Reg.* v. *Southampton (County) Inhabitants of the* (17 Q. B. D. 424) in part dissented from - - - - - 590
See BRIDGE.

—— *Rex* v. *Wandsworth* (1 B. & Ald. 63) approved - - - - 590
See BRIDGE.

—— *Roberts* v. *Roberts* (13 Q. B. D. 794) distinguished - - - 276
See BILL OF SALE.

—— *Ross* v. *Army and Navy Hotel Co.* (34 Ch. D. 43) distinguished - - - 568
See COMPANY.

—— *Ryder* v. *Wombwell* (Law Rep. 3 Ex. 90) dissented from - - - 509
See INFANT.

—— *Sheppard* v. *Bradford* (N. B. (N.S.) 369; 33 L. J. (M.C.) 182) dissented from 280
See POOR-RATE. 3.

—— *Thomas* v. *Quartermaine* (18 Q. B. D. 685) discussed - - - - 423
See NEGLIGENCE.

—— —— v. ——
distinguished - - - - 647
See NEGLIGENCE. 2.

—— *Watkins* v. *Evans* (18 Q. B. D. 386) discussed - - - - 204
See BILL OF SALE. 4.

CERTIORARI—Borough—Expenses of opposing bill in parliament - - - 22
See MUNICIPAL CORPORATION.

CHARITY—Revenue—Exemption—Payments "applied to charitable purposes only" what are - - - - 624
See REVENUE. 4.

CHARTERPARTY—Bill of lading—Estoppel—Quantity of goods shipped - 333
See SHIP.

CHECK-WEIGHER — Wages—Coal mine—Payment by weight of mineral - 357
See Mine.

CHURCH—Ecclesiastical law—Effect of expiration of sentence on order of suspension—Power to issue significavit for contempt—Writ de contumace capiendo - 307
See Ecclesiastical Law.

COAL MINE—Negligence—Breach of statutory duty—Volenti non fit injuria - 423
See Negligence.

—— Wages—Payment by weight of mineral
See Mine. [357

COLLISION—Admiralty—County court—Action under 50*l.*—Jurisdiction - - 428
See County Court.

COMMISSION—Officer—Right to resign commission—Conditions of service—Desertion
See Officer. [13

COMMISSIONERS — Improvement—Urban sanitary authority—Notice of action—"Act done under the provisions of this Act"—Penalty - - - - 352
See Local Government Acts. 2.

COMPANY—*Debenture — Interpleader — "Covering" Deed—Bills of Sale Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 17.] Debentures were issued by a limited company in the form of bonds by which the company covenanted to pay to bearer the principal and interest, each debenture containing a clause that the repayment was secured by an indenture of mortgage made between the company and certain persons as trustees for the debenture holders. The mortgage deed was not identified in the debentures by its date or by any further particulars of its contents; and the debentures themselves did not affect to pass any of the company's property to the holder. The deed itself, which was of even date with the debentures, was an ordinary deed of mortgage, purporting to convey all the land, plant, machinery, fixtures, &c., of the company to the mortgagees; it contained no trust for the benefit of the debenture holders. It was not registered as a bill of sale.—Goods and chattels of the company having been seized in execution under a judgment obtained by the plaintiff, a claim was made to them by a holder of the debentures:—*Held*, that the mortgage deed being void for want of registration under the Bills of Sale Acts, the debentures created no charge enforceable by the holder against a bonâ fide execution creditor.—*Ross* v. *Army and Navy Hotel Co.* (34 Ch. D. 43) distinguished. Jenkinson *v.* Bradley Mining Company - - - - - - 568

2. —— *Liquidation — Master and Servant—Appointment of Manager and Receiver—Discharge of Servants.*] The plaintiff was in the service of the defendant company under a contract which provided that his employment might be determined by six months' notice. A manager and receiver was appointed by order of the Chancery Division at the instance of holders of debentures of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new

COMPANY—*continued.*
company, and the plaintiff was dismissed without notice. In an action for wrongful dismissal:—*Held*, by the Court of Appeal, affirming the judgment of Manisty, J., that the appointment of a manager and receiver operated to discharge the servants of the company and that the defendant could not recover. Reid *v.* Explosives Company - - - - - - [C. A. 264

—— Subrogation — Company borrowing ultra vires—Equity of sender to be subrogated to rights of creditors paid out of money borrowed—Debt not in existence at time of advance - - - - 155
See Practice. 13.

CONNIVANCE—Adultery by wife—Liability of husband for necessaries supplied to wife
See Husband and Wife. [379

CONTEMPT—Ecclesiastical court—Effect of expiration of sentence on order of suspension - - - - 307
See Ecclesiastical Law.

CONTRACT—*Suretyship and Guarantee—Consideration—Forbearance—Promissory Note.*] For the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly at the rate of 5 per cent. per annum until the amount was paid. The plaintiff having forborne to sue for several years:—*Held*, that, the plaintiff having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing. Crears *v.* Hunter C. A. 341

COPYRIGHT — *Pictures — Infringement — Copies made before Registration—Sale after Registration* —25 & 26 *Vict.* c. 68, *ss.* 1, 4, 6, 11.] The Copyright Act of 1862 (25 & 26 Vict. c. 68) applies only to statutory copyright, and gives no remedy for infringement of the common law right of property in works of art, which exists before publication. The plaintiffs employed the defendant to produce copies of a drawing in which the plaintiffs had the copyright. The defendant without the plaintiffs' knowledge made other copies and imported them into England. Afterwards the plaintiffs registered their copyright. After such registration the defendant sold copies in England.—In an action to recover penalties under s. 6 and damages under s. 11 of 25 & 26 Vict. c. 68, for infringement of the plaintiffs' copyright:—*Held*, that the statute gave no remedy for infringement of any common law right, that, by s. 4, the plaintiffs were not entitled to recover in respect to anything done before registration, that the sale, after registration, of copies made and imported before registration, was not unlawful, so as to give a right of action, and therefore the defendant was entitled to judgment. Tuck *v.* Priester - - - - 48

2. —— *Picture — Infringement—Injunction—Damages—Penalties—Copies made Abroad before Registration—Sale in England after Registration*

COPYRIGHT—*continued.*

—25 & 26 *Vict. c.* 68, *ss.* 1, 3, 4, 6, 10, 11.] The plaintiffs employed the defendant, who was a printer in Berlin, to make for them copies of a drawing of which they had the copyright. The defendant executed the order, and also, without the plaintiffs' knowledge or consent, made other copies, and imported them into England. After this the plaintiffs registered their copyright under 25 & 26 Vict. c. 68, and after the registration the defendant sold in England some of the copies which he had imported.—In an action to recover penalties under s. 6, and damages under s. 11, of the Act, for infringement of the plaintiffs' copyright:—*Held*, by Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., dissenting), that though, by reason of s. 4, the plaintiffs could not recover damages from the defendant for the making of the unauthorized copies before the registration, they were entitled to damages for the sale of those copies after the registration—But, *held*, that, the plaintiffs could not recover penalties in respect of the sale of such copies after registration: *Held*, by Lopes, L.J., that by s. 4 the plaintiffs were, with regard to the right to recover damages and penalties, placed until registration in the same position as if they had no copyright; and that the making of the copies before registration, and the sale of those copies after registration, were so connected together that the plaintiffs could not recover either damages or penalties in respect of the sale:—*Held*, by all the Court, that there was an implied contract that the defendant should not make any copies of the drawing other than those ordered by the ptaintiffs, and that, independently of the statute, the plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract.— Decision in previous case reversed. Tuck & Sons *v.* Priester [C. A. 629

CORONER—*Jurisdiction—Prison for County—Inquest on Prisoner—Coroner for County—Prison Acts*, 1865 *and* 1877 (28 & 29 *Vict. c.* 126), *ss.* 48, 57, *and* 40 & 41 *Vict. c.* 21, *s.* 30—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 171, *sub-s.* 1, *s.* 228, *sub-s.* 4.] Notwithstanding the transfer of prisons to the Secretary of State by the Prison Act, 1877, a prison, as to which no rules have been made under s. 30 of that Act, and which at the commencement of the Prison Act, 1865, was a prison belonging to a county, is still the county prison, although locally situate within the limits of a city, and therefore the jurisdiction to hold inquests on prisoners dying in such prison is in the coroner for the county, and not in the coroner for the city, and such jurisdiction is not affected by s. 171, sub-s. 1, of the Municipal Corporations Act, 1882. The Queen *v.* Robinson [322

COSTS—Solicitor—Interest on disbursements—Demand from client - - 516
See Solicitor and Client. 2.

—— Solicitors' Remuneration Act, 1881—Non-contentious business—"Perusing" 1
See Solicitor and Client.

—— Counter-claim—Claim admitted on pleadings - - - - - 396
See Practice. 4.

COSTS—*continued.*

—— Gasworks—Inquiry into state and condition of concern—Sessions—Jurisdiction 481
See Gasworks.

COUNTY—Bridge—Liability to repair—Acquiescence by county—Evidence of - 590
See Bridge.

COUNTY COURT — *Jurisdiction — Admiralty Causes—Collision—Actions under* 50*l.*—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 5.] The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), does not deprive county courts not having Admiralty jurisdiction of their original jurisdiction to try actions to recover damages for injuries caused by collision between vessels where the amount claimed does not exceed 50*l.* Scovell *v.* Bevan [428

2. —— *Payment into Court with Denial of Liability—County Courts Act*, 1846 (9 & 10 *Vict. c.* 95), *s.* 12—*County Court Rules*, 1886, *Order IX., rr.* 11, 12—*Forms* 103, 104—*Order LI., r.* 27.] The defendant in an action in a county court paid money into court, stating at the same time in a memorandum addressed to the registrar that the payment was made "without prejudice to the defendant's defence to this action and while denying the plaintiff's cause of action":—*Held*, by Day, J., and Wills, J., that the payment into court was not an admission of liability, and that the defendant was entitled to dispute his liability at the hearing.—*Per* Wills, J.:—The County Court Rules, 1886, embody the results of the decision in *Berdan* v. *Greenwood* (L. R. 3 Ex. D. 251), and apart from the notice the defendant was entitled to pay money into court and afterwards to dispute his liability at the hearing. Harper *v.* Davis [170

—— Appeal to High Court—Liability for sheriff's charges subsequent to interpleader order - - - - - - 77
See Practice. 9.

—— Appeal—Motion for new trial—Time of appealing - - - - - 151
See Practice. 3.

—— Remitted issue—Appeal—New trial 523
See Practice. 7.

—— Transfer from High Court—Action for slander—Jurisdiction - - 62, 419
See Practice. 5, 6.

—— Friendly society—Branch—Expulsion of member—Appeal from branch to society—Jurisdiction - - - - 491
See Friendly Society.

CRIMINAL LAW—*Malicious injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52—*Damage to Real Property—Mushrooms growing in a wild state.*] In order to constitute the offence of wilfully or maliciously committing damage, injury, or spoil to or upon any real property under s. 52 of the Malicious Injuries to Property Act, 1861, there must be proof of actual damage to the realty itself, and mere damage to uncultivated roots or plants growing upon the realty is insufficient to justify a conviction.—The respondent gathered mushrooms in a field belonging to the appellant. They were of value to the latter, but they grew

CRIMINAL LAW—*continued.*
spontaneously, and were entirely uncultivated. No damage was done by the respondent to the grass or the hedges:—*Held*, that, upon the above facts, the respondent had not been guilty of an offence within s. 52 of the Act. GARDNER *v.* MANSBRIDGE - - - - - - 217

2. —— *Perjury—Examination before a Court of Bankruptcy—Necessity for the presence of the Judge or Registrar during the Examination—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 27, *sub-ss.* 1, 2, 3, 4, 5—*Bankruptcy Rules*, 1886, *rr.* 66, 88.] The prisoner was convicted of perjury alleged to have been committed in an examination by "the Court" under s. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under s. 27 before a county court having jurisdiction in bankruptcy. The oath was administered to the prisoner in court by the registrar. The registrar remained in court. The examination of the prisoner in the course of which the answers in question were given, took place in a room used for examinations, in the absence of the registrar:—*Held*, that there had been no valid examination by "the Court" within s. 27 and that the conviction must be quashed. THE QUEEN *v.* LLOYD - - - - C. C. R. 213

—— Acquittal—Power to stay proceedings—Fresh indictment - - - 590
See BRIDGE.

—— Indictment—Absence of formal conclusion
See HIGHWAY. [602

DAMAGES, MEASURE OF—Carrier—Delay in delivery of samples—Loss of season 30
See CARRIER.

—— Sheriff—Landlord and tenant—Liability of sheriff to landlord for removal of goods under execution after notice of claim for arrears of rent—Forced sale - 563
See LANDLORD AND TENANT.

DEATH—Bankruptcy—Death of debtor before service of petition—Substituted service
See BANKRUPTCY. 4. [538

DEBENTURE — Bill of sale — Interpleader — "Covering deed" - - - 568
See COMPANY.

DEFAMATION—Action for slander—Transfer to county court - - - 62
See PRACTICE. 5.

DENTIST—*Dentists Act*, 1878 (41 & 42 *Vict. c.* 33)—*Dentists' Register—Withdrawal of Diploma of Licentiate by Medical Authority—Erasure from Register.*] Where a person has been registered under the Dentists Act, 1878, as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the dentists' register under the Act. EX PARTE PARTRIDGE - - - - - C. A. 467

DESCRIPTION—Bill of sale—Chattels specifically described - - - - 276
See BILL OF SALE.

DESERTION—Officer—Navy—Right to resign commission—Conditions of service 13
See OFFICER.

DIPLOMA—Dentists' register—Withdrawal of diploma of licentiate by medical authority—Erasure from register - 467
See DENTIST.

DOCK—Mersey—Tonnage rates - - 123
See SHIP. 4.

DRUG — Adulteration — Tincture of opium — British pharmacopœia - - 582
See ADULTERATION.

ECCLESIASTICAL LAW—*Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86)—53 *Geo.* 3, *c.* 127—5 *Eliz. c.* 23—*Effect of Expiration of Sentence on Order of Suspension—Power to issue Significavit for Contempt—Writ de Contumace Capiendo.*] In a proceeding in the Province of York a clerk in orders was accused of offences under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), and, being found guilty, an order was made by the official principal for his suspension ab officio for a period of six months. During this period he officiated in breach of his suspension. Afterwards during the six months his disobedience in respect of having so officiated was signified at the instance of the promoter, and after the expiration of the six months he was imprisoned under a writ de contumace capiendo:—*Held*, that the imprisonment was illegal, as, the period of suspension under the order of having expired, the order was no longer in force, and a writ de contumace capiendo could not be issued.—The writ de contumace capiendo was improperly indorsed "The Public Worship Regulation Act, 1874":—*Held*, that this irregularity did not render the imprisonment illegal.—*Dean* v. *Green* (Law Rep. 8 P. D. 79) followed. EX PARTE REV. JAMES BELL COX [307

ELECTION — Municipal corporation — "Mayor elect"—Voting for alderman - 498
See MUNICIPAL CORPORATION. 2.

EMPLOYER AND WORKMAN — Employer's Liability Act, 1880—Driver employed by wharfinger — Vicious horse — Risk voluntarily incurred — "Workman" — "Plant" - - - - 647
See NEGLIGENCE. 2.

—— Person intrusted with superintendence — Ganger or foreman of labourers - 585
See NEGLIGENCE. 3.

ESTOPPEL—*Conduct—Negligent Representation—Proximate Cause of Loss—Wharfinger.*] Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, and the defendant was not made aware of the mistake. The warrant had been negotiated, and was in January, 1886, in the possession of B. & E. In that month, no rent having been paid for the goods since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him, as the supposed owner of the warrant, as the person presumedly interested in the goods, that the goods were in hand, that rent was due, and that, unless it was paid, the goods

ESTOPPEL—*continued.*
would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. & E. and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession.—In an action to recover damages for a wrongful conversion of the goods:—*Held*, affirming the judgment of Denman, J., that the defendant was liable, being estopped from denying that he had the goods specified in the warrant because he had by his negligent misrepresentation led the plaintiff to believe that the goods were in his possession, and such misrepresentation was the cause of the plaintiff's loss, the plaintiff having purchased the warrant in consequence of the same. Seton *v.* Lafone - - C. A. 68

—— Bankruptcy—Statement of affairs - 347
See Bankruptcy. 7.

—— Bill of lading—Quantity of goods shipped
See Ship. [333

EVENT—Trial by jury—Admission on pleadings—Judges order as to costs—Jurisdiction
See Practice. 4. [396

EVIDENCE—Bankrupt—Public examination
See Bankruptcy. [572

—— Infant—Necessaries - - - 509
See Infant.

EXAMINATION—Answers of bankrupt—Evidence - - - - - 572
See Bankruptcy. 5.

EXCISE—Dilution of beer by publican - 524
See Revenue. 5.

EXECUTION—Executor—Bankruptcy, completion of interpleader—Seizure and sale
See Bankruptcy. 8. [285

EXECUTION, STAY OF—Appeal to House of Lords—Application, where to be made
See Practice. 2. [83

EXECUTOR AND ADMINISTRATOR—*Contracts made whilst no Personal Representative of a Deceased's Estate—Ratification—Services for Benefit of Estate.*] During a period in which there was no personal representative of the estate of a deceased testatrix, the appellant, acting upon the instructions of Easton, a relative of the deceased, did work as a solicitor in respect of the administration and for the benefit of the estate. Subsequently the respondent Phillips obtained letters of administration de bonis non, and refused to pay the appellant's bill of costs:—*Held* (affirming the decision of the Queen's Bench Division), that the respondent was not bound, as administrator, to pay such costs. In re Watson. Ex parte Phillips - - C. A. 234

EXECUTOR—Sheriff—Under-sheriff—Vacancy of shrievalty—Liability of under-sheriff
See Sheriff. [575

FISHERY—Salmon—Water bailiff—Obligation to produce instrument of appointment
See Salmon Fishery Acts. [75

FRIENDLY SOCIETY—*Branch—Expulsion of Member—Appeal from Branch to Society—Failure to decide thereon within forty Days—Application to County Court—Jurisdiction—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.] By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 22, disputes between members of a registered friendly society and the society are to be decided in manner directed by the rules of the society. By sub-s. (*d*) where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply to the county court, which may hear and determine the matter in dispute.—A member of a branch of a friendly society having been excluded therefrom by the branch committee appealed, under the rules of the branch, to the general committee of the society, who failed to decide the dispute within forty days after application:—*Held*, that the appeal was a "reference" within the meaning of the sub-section, and that a county court had jurisdiction to hear and determine the matter in dispute. The Queen *v.* Catley. Catley *v.* Bill - 491

GASWORKS—*Gasworks Clauses Act*, 1847 (10 *Vict. c.* 15), *s.* 35—*Inquiry into State and Condition of Concern—Jurisdiction of Quarter Sessions—Power to re-open Accounts of previous years—Costs of Inquiry.*] By s. 35 of the Gasworks Clauses Act, 1847, a court of quarter sessions may, on the petition of two gas-rate payers, appoint some accountant, or other competent person, to examine and ascertain at the expense of the gas company (the amount of the expense to be determined by the Court) the actual state and condition of the concerns of the company, and to make a report thereof to the Court, and power is given to the Court to examine witnesses on oath touching the truth of the said accounts and the matters therein referred to: and if it appear to the Court that the profits of the company during the preceding year have exceeded the prescribed rate, the Court has power, in case the whole of the reserve fund has been and remains invested, and in case dividends to the amount thereinbefore limited have been paid, to make an order reducing the price of the gas supplied by the company.—A petition was under the above section presented to the recorder of Hanley praying him to appoint a person to inquire into the actual condition of the undertaking of the prosecutors, and an accountant was appointed. During the inquiry he examined not only the accounts of the then previous year, but re-opened all the accounts of previous years to 1871, and a report based upon this inquiry was sent in by him to the recorder. It was admitted that the whole of the reserve fund was not then and never had been invested, and that the prescribed maximum dividend had not been paid. The recorder, being of opinion that the accounts when amended shewed that the company had in point of fact earned enough to pay the prescribed maximum dividend, and to have invested and kept invested the whole of the reserve fund, made an order reducing the price of gas 6*d.* per 1000 cubic feet. He further ordered the prosecutor to pay 650*l.* the expense of the proceedings before the accountant, and to pay to the petitioners 2433*l.* 6*s.* 6*d.*, "their costs of and incident to the petition." Upon an application for a writ of certiorari to

GASWORKS—*continued.*
quash the order as being made without jurisdiction:—*Held*, that the order to reduce the price of gas was bad, the power of the recorder being absolutely restricted by s. 35 to cases where the whole of the reserved fund has been invested and the prescribed dividend paid; and that the recorder acted without jurisdiction in ordering the costs of the petitioners to be paid by the prosecutors.—*Per Curiam.* The accountant and the recorder had jurisdiction to inquire into the accounts of past years for the purpose of ascertaining the actual condition of the concern; but *semble*, that they had no power to disallow and re-cast them, and by so doing vary the accounts of the year into which they were inquiring. THE QUEEN *v.* RECORDER OF HANLEY - - - 481

GUARANTEE — Consideration — Forbearance—Promissory note - - - 341
See CONTRACT.

GENERAL AVERAGE—Stranding—Effect of—Discharge of part of the cargo before the commencement of extraordinary measures for getting off the ship - - - 362
See SHIP. 2.

HIGHWAY — *Municipal Corporation—Liability to repair—Urban Sanitary Authority—Highway Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50)—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 144—*Form of Indictment—Amendment.*] An indictment against a municipal corporation for non-repair of a highway alleged that the highway was in decay, and that the corporation, "acting by the council as the sanitary authority for the urban district," ought to repair and amend the same, &c.; but there was no allegation to shew how the defendants were liable, nor did the indictment conclude with the words "against the form of the statute." —At the trial the judge intimated his willingness to make any amendment within his power; but no amendment was in fact made. A verdict having been found for the Crown:—*Held*, first, that the indictment was bad, and that the defendants were entitled to judgment non obstante veredicto.—Secondly, that even assuming the necessary amendments to be made, the defendants were entitled to judgment, there being nothing in the Public Health Act, 1875, to make the urban sanitary authority liable to indictment for non-repair, in the same sense as that in which the parish or other persons liable ratione tenuræ were liable.—*Quære*, whether an indictment would lie if the preliminary steps before magistrates, required by 5 & 6 Wm. 4, c. 50, s. 20, were taken. THE QUEEN *v.* MAYOR, &C., OF POOLE - 602

HOUSE OF LORDS—Stay of execution pending appeal to House of Lords—Application, where to be made - - - 83
See PRACTICE. 2.

HUSBAND AND WIFE—*Liability of Husband for Necessaries supplied to Wife—Adultery of Wife—Connivance by Husband—Condonation.*] In an action against a husband for necessaries supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means

HUSBAND AND WIFE—*continued.*
of support; and that the plaintiff supplied her with the necessaries in question while she was living separate from her husband:—*Held*, that the husband was liable. WILSON *v.* GLOSSOP 379

2. —— *Married Women—Contract—Separate Property—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 3.] Sect. 1, sub-s. 2, of the Married Women's Property Act, 1882, does not make a married woman capable of rendering herself liable in respect of her separate property on any contract unless she has some separate property at the time the contract is made.—In an action against a married woman to recover the price of goods sold and delivered to her:—*Held*, that the onus was on the plaintiff to shew that the defendant had separate property at the time she made the contract. PALLISER *v.* GURNEY - - - - - 519

3. —— *Separate Estate—Post-nuptial Settlement—Restraint upon Anticipation—Contract by Wife during Coverture—Judgment against her after Husband's Death—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2–4, *and ss.* 5, 19.] By a post-nuptial settlement, made before the Married Women's Property Act, 1882, property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children. The wife after the Act and during coverture made a promissory note in favour of the plaintiffs, and after the death of the husband the plaintiffs obtained judgment upon the note against the widow and an order for the appointment of a receiver of the rents and profits of the property in settlement: —*Held*, that upon the true construction of the Act, ss. 1, 5, and 19, the property in settlement was not liable to satisfy the judgment, and that the order appointing the receiver must be discharged. BECKETT *v.* TASKER - - - 7

—— Loan by wife to partnership in which husband a partner—Bankruptcy of partnership - - - - - 88
See BANKRUPTCY. 9.

INCOME TAX—Business carried on in colony—Partner residing in England—Share of profits not remitted to England - 400
See REVENUE. 2.

—— Tithe rent-charge—Annual value - 442
See REVENUE. 7.

INDEMNITY—Marine policy—Suing and labouring clause—Third party notice - 458
See PRACTICE. 14.

INFANT—*Necessaries—Evidence.*] Where an infant is sued for the price of goods sold to him on credit, he may, for the purpose of shewing that they were not necessaries, give evidence to shew that at the time of the sale he was sufficiently provided with goods of the kind supplied. —*Ryder* v. *Wombwell* (Law Rep. 3 Ex. 90) dissented from. *Barnes* v. *Toye* (13 Q. B. D. 410) approved. JOHNSTONE *v.* MARKS - - 509

INDICTMENT—Absence of formal conclusion—Amendment - - - - 602
See HIGHWAY.

—— County—Bridge—Liability to repair—Practice—Verdict of acquittal—Motion for new trial by prosecution - 590
See BRIDGE.

INN—Licensing Acts—Intoxicating liquor—Sale of in marked measure - - 478
See LICENSING ACTS.

INQUEST—Prison for county—Inquest on prisoner—Jurisdiction - - 322
See CORONER.

INSURANCE (LIFE)—*Policy—Death by Accident—"Within the United Kingdom"—Condition in Policy—Notice of Accident—Omission to give Notice—Insurer's Liability.*] A policy of insurance covered death caused by accident happening within the United Kingdom, and was made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days.—The assured was accidentally drowned in Jersey. It was impossible to give notice within seven days.—In an action on the policy:—*Held*, that the accident happened within the United Kingdom, and that notice was not a condition precedent to the right to recover, and the insurers were liable. STONEHAM *v.* OCEAN, RAILWAY, AND GENERAL ACCIDENT INSURANCE COMPANY - - - - 237

—— Bankruptcy—Insurance on bankrupt's life—Submission to medical examination
See BANKRUPTCY. 6. [39

INSURANCE (MARINE)—*Mutual Insurance Association—Construction of Rules—Damage to Cargo by "improper Navigation"—Negligence—Insufficiently-closed Port.*] By the articles of a mutual insurance association the members agreed to indemnify each other against losses, damages, and expenses arising from or occasioned by any loss or damage of or to any goods or merchandize caused by "improper navigation of the ship carrying the goods," for which any such member might be liable.—A cargo of wheat was shipped on board a vessel belonging to the plaintiffs, who were members of the association. During the loading of the cargo an opening or port in the side of the vessel was, by the negligence of persons employed by the plaintiffs insufficiently secured, so that during the voyage water leaked in and damaged the wheat in the lower hold, and the plaintiffs became liable to pay and paid compensation to the owners of the cargo. The leak did not hinder or impede the navigation of the vessel in the course of her voyage:—*Held*, affirming the judgment of the Queen's Bench Division, that this was a damage arising from "improper navigation of the ship," within the articles of association, for which the plaintiffs were entitled to recover. CARMICHAEL & CO. *v.* LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION - - C. A. 242

2. —— *Mutual Association for—Action for Contributions—Principal and Agent—Undisclosed Principal not Member of Association.*] T., the manager and part owner of a ship, became a member of a mutual insurance association, and took out a policy with such association in respect of the ship.—The articles of association gave power to the committee, in order to provide funds for the business of the association, from time to time to direct sums to be paid by the members rateably. By the policy, which was made by the association under their seal, the association agreed with T. that the members thereof should according to the articles of association pay and make good losses and damages to the ship occasioned by the risks insured against, subject to a proviso that the association should be liable only to the extent of so much of the funds as they were able to recover from the members liable for the same and which were applicable for the purpose of paying claims under the policy. Certain contributions to the funds of the association having, in accordance with the articles, become payable by T. in respect of the ship, and T. being bankrupt, the association sued N., another part owner of the ship, for such contributions as an undisclosed principal of T.:—*Held*, that, the effect of the articles of association and the policy being that the liability for such contributions was imposed on members only, and N. not being a member of the association, he could not be sued for such contributions as an undisclosed principal of T. UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION *v.* NEVILL [C. A. 110

INTEREST—Bill of costs—Solicitor—Demand from client - - - 516
See SOLICITOR AND CLIENT. 2.

INTERPLEADER—Bankruptcy—Completion of execution—Seizure and sale - - 285
See BANKRUPTCY. 8.

—— Bill of sale—Debenture—"Covering" deed
See COMPANY. 8. [568

—— Decision in a summary manner—Appeal
See PRACTICE. 8. [139

—— Practice—Charges of sheriff subsequent to interpleader order - - - 77
See PRACTICE. 9.

JOINT CONTRACT—Bill of exchange given by one contractor for debt—Judgment—Res judicata - - - 229
See PARTNERSHIP.

JOINT LIABILITY—Breach of trust—Partnership—Bankruptcy—Joint and separate proof - - - 84
See BANKRUPTCY. 10.

JUDGMENT—Sale of goods—Bill given for price—Unsatisfied judgment on bill—Action against joint contractor for price—Res judicata - - - 229
See PARTNERSHIP.

JUSTICES—*Practice—Power of Justices to state a Special Case under Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33—Summary Jurisdiction Rules, 1886, r. 18.*] A court of summary jurisdiction has no power to state a special case under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, unless an application has been made to the Court in writing, and unless a copy of such application has been left with the clerk of the Court within seven days from the

JUSTICES—*continued.*
date of the proceeding to be questioned, according to the Summary Jurisdiction Rules, 1886, r. 18.] South Staffordshire Waterworks Company *v.* Stone - - - - - - - - 168

LANDLORD AND TENANT—*Sheriff—Claim for Arrears of Rent—Liability of Sheriff to Landlord for Removal of Goods under Execution after Notice of Claim for Arrears of Rent—Forced Sale—Measure of Damages—8 Anne, c. 14, s. 1.*] In an action under 8 Anne, c. 14, s. 1, against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is primâ facie the amount of rent due, but it is competent to the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due. Thomas *v.* Mirehouse - - 563

—— Advertisement hoardings—Agreement creating tenancy - - - - 288
See Poor-rate. 2.

LICENSING ACTS—*Intoxicating Liquor—Sale of, in marked Measure—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 8.] By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed to him. The customer could not see the beer drawn, and never saw it while in the measure. The publican having been convicted of an offence under s. 8:—*Held*, that the sale was not complete until the beer was handed to the customer, that the beer was not sold in a marked measure as required by the statute, and that the conviction was right. Addy *v.* Blake - 478

LIMITATIONS, STATUTE OF — Amendment — Statement of claim—Claim barred by Statute of Limitations - - - 394
See Practice.

LIQUIDATION—Bankruptcy—Power of Court to restrain creditors from holding a meeting to remove the trustee - - - 679
See Bankruptcy. 13.

—— Company — Appointment of manager and receiver—Discharge of servants - 264
See Company. 2.

LOCAL GOVERNMENT ACTS—*Local Authority—Joint Board—Component Districts—Expenses of carrying out Provisional Order—Apportionment of Contributions—"Special Expenses"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 229, 230, 283, 284.] A provisional order of the Local Government Board, confirmed by a local Act, provided that the expenses incurred by the joint board for the district should be defrayed out of a common fund, to be contributed by the competent districts in manner provided by s. 283 of the Public Health Act, 1875, and that the contributions of certain of the component districts should be contributed and raised as if they were required

LOCAL GOVERNMENT ACTS—*continued.*
to defray "special expenses" within the meaning of the Public Health Act, 1875:—*Held*, on a special case, that the joint board should apportion the contributions of the component districts according to the rateable values of the properties in such districts, to be ascertained according to the valuation list, and that the rateable values of tithes, tithe commutation rent-charges, land used as arable meadow or pasture ground only, or as woodlands, market gardens, or nursery grounds, or covered with water, or used as a canal or towing path, or as a railway, should be taken at the full value appearing in the valuation list, and not at one-fourth thereof. Darenth Main Valley Sewerage Board *v.* Guardians of Poor of Dartford Union - - - - 270

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 5, 10, 12, 254, 341—*Improvement Commissioners—Urban Sanitary Authority—Notice of Action—Act "done under the provisions of this Act"—Penalty.*] The effect of the Public Health Act, 1875, which makes improvement commissioners under local Acts urban sanitary authorities, is to reconstitute them as new bodies under the Act, vesting in them as such new bodies the powers given by the local Acts as well as those given by the Public Health Act; and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local Acts are acting under the Public Health Act, 1875, and consequently are entitled in respect of such Act to any protection or privilege given by that Act to members of local authorities acting under its provisions.—So *held*, by the Court of Appeal, affirming the judgment of Wills, J. (17 Q. B. D. 139). A person who is in fact disqualified from being a member of a local authority but who acts in a bonâ fide belief that he is a member is entitled to notice of action under s. 264 of the Public Health Act, 1875. Lea *v.* Facey - - - - C. A. 352

—— Borough—Opposition to bill in parliament—Expenses — Register of owners and proxies—Time for sending in claims 22
See Municipal Corporation.

—— Highway—Urban sanitary authority—Form of indictment - - - 602
See Highway.

LONDON—Compulsory pilotage — Exemption — London district—Ship trading to place north of Boulogne - - - 447
See Ship. 3.

—— Tithes—Rate on house property—Commutation - - - - - 431
See Poor-rate. 4.

LUGGAGE—Passenger—Railway—Special contract—Conditions of non-liability 64
See Carrier. 2.

MALICIOUS INJURY — Property — Mushrooms growing in a wild state - - 217
See Criminal Law.

MARRIED WOMAN—Liability of husband for necessaries supplied to wife—Adultery—Condonation - - - 379
See Husband and Wife.

MARRIED WOMAN—*continued.*
—— Separate property—Contract - - 7, 519
See Husband and Wife. 2, 3.
MASTER AND SERVANT—Company—Liquidation—Discharge of servants - 264
See Company. 2.
—— Employers' Liability Act, 1880 — Driver employed by wharfinger—Vicious horse—Risk voluntarily incurred—"Workman"—"Plant" - - - 647
See Negligence. 2.
—— Negligence—Employers' Liability Act, 1880—Person intrusted with superintendence—Ganger or foreman of labourers 585
See Negligence. 3.
MAYOR — Election — Municipal corporation — "Mayor elect" voting for alderman 498
See Municipal Corporation. 2.

MAYOR'S COURT, LONDON—*Appeal to High Court—Claim over 20l.—Practice—Leave to appeal—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 8—*Judicature Acts, Order LIX., r.* 10.] By the Mayor's Court of London Procedure Act, 1857, s. 8, an appeal from the Mayor's Court to the superior Courts is given where the sum sought to be recovered exceeds 20*l.*, and by s. 9 such appeal is to be by special case. By s. 10 the parties in any case in the Mayor's Court may, if the judge grants leave, move in the superior Courts to set aside the verdict:—*Held*, that Order LIX., r. 10, which provides that all appeals from inferior Courts shall be by notice of motion, does not make it necessary where the sum sought to be recovered in the Mayor's Court exceeds 20*l.*, and a motion to set aside the verdict and judgment on the ground of misdirection is made in the High Court, that the leave of the judge of the Mayor's Court should be obtained. Eder *v.* Levy - - - - 210

MEDICAL PRACTITIONER—*Unregistered Assistant, Right of Registered Practitioner to recover for Services of—Medical Act*, 1858 (21 & 22 *Vict. c.* 90), *ss.* 31, 32—*Apothecaries Act* (55 *Geo.* 3, *c.* 194), *s.* 21.] A qualified medical practitioner, duly registered under the Medical Act, 1858, established a branch practice under the management of his brother, who was not so qualified or registered, and held no apothecaries' certificate under 55 Geo. 3, c. 194. In an action by the assignee of the qualified practitioner to recover charges for medical aid and advice rendered, and the cost of medicines supplied, to the defendant by the brother alone, without consulting the qualified practitioner:—*Held*, that under ss. 31 and 32 of the Medical Act, 1858, the plaintiff was not entitled to recover. Howarth *v.* Brearley - - - - - 303

MERSEY DOCK ACTS—Tonnage rates - 123
See Ship. 4.

METROPOLIS MANAGEMENT ACTS—*New Street in Two Districts—Order for exclusive Management by One District—Paving Expenses, Recovery of—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 140 — *Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 86.] An order of the Metropolitan Board of Works made under s. 140 of the Metropolis Management Act, 1855, and s. 86 of the Metropolis Management Amendment Act, 1862, that a new street in more than one parish or district shall be under the exclusive management of one vestry or district board for the purposes of paving, and the expenses payable by each be divided equally between the two parishes or districts, does not entitle the managing vestry or board to require the other vestry or board to pay one-half of the expenses properly chargeable on frontagers under s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Amendment Act, 1862. Vestry of St. Giles, Camberwell *v.* Board of Works for Greenwich District - - - - - - 502

2. —— *Vestry, Officer of—Superannuation Allowance—Discretion as to Amount*—29 *Vict. c.* 31, *ss.* 1, 4.] A metropolitan vestry has a discretion under 29 Vict. c. 31, s. 1, to grant or to refuse a superannuation allowance to a retiring officer, but, if an allowance be granted, the vestry has no discretion as to the amount, which must be in accordance with the scale prescribed in s. 4. The Queen *v.* Vestry of St. George's, Southwark - 533

METROPOLIS — Poor-rate — Assessment — Provisional list—Alteration in value of hereditament during year—Diminution of income - - - - - 529
See Poor-rate.

MINE—*Wages—Payment by Weight of Mineral—Mode of determining Deductions—Illegality—Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.] By the Coal Mines Regulation Act, 1872, s. 17, persons employed in certain mines are to be paid according to the weight of mineral gotten, provided that agreements may be made as to certain deductions, "such deductions being determined by the banksman or weigher and checkweigher (if there be one)."—In the defendants' colliery the coal was weighed close to the pit's mouth, in presence of the weigher and checkweigher, and was then carried to a distance, and thrown on to a screen, and the weight of the slack which passed through the screen was ascertained by a person in the defendants' employ, who was not a weigher or check-weigher, and wages were paid according to the weight of the coal, after deducting the weight of such slack.—In an action by persons employed in getting the coal to recover the amount so deducted from their wages:—*Held*, that the deductions, not having been determined as provided by the statute, were illegal, and the plaintiffs were entitled to recover. Bourne *v.* Netherseal Colliery Company - - - 357

MORTGAGE—Covenant in bill of sale to pay interest on mortgages - - 391
See Bill of Sale. 5.

MUNICIPAL CORPORATION — *Application of Borough Fund—Poll—Register of Owners and Proxies, whether necessary—The Municipal Corporations (Borough Funds) Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 4—*The Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *sched. II. r.* 19.] By Cave, J. The town council of a borough is not bound, under the Public Health Act, 1875, sched II., r. 19, to keep a register of owners and proxies for the purpose of taking a poll in the borough with respect to the application under 35 & 36 Vict. c. 91, of the

MUNICIPAL CORPORATION—*continued.*
borough funds in opposing local and personal bill in parliament. WARD *v.* MAYOR, &c., OF SHEFFIELD - - - - - - 22

2. —— *Election of Alderman—"Mayor elect" voting for Aldermen—Void Election*—45 & 46 *Vict. c.* 50, *s.* 60.] By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 60 (2), the election of aldermen shall be held immediately after the election of the mayor; "(3) an outgoing alderman, although mayor elect, shall not vote." On the day appointed for the election of mayor and aldermen an alderman was elected mayor, and thereupon made and subscribed a declaration in the form contained in the 8th schedule of the Act. He then voted in the election of aldermen:—*Held*, that his vote was invalid, for at the time when he voted he had not ceased to be an "outgoing alderman" within s. 60 (sub-s. 3) of the Act. BRIDPORT ELECTION PETITION. HOUNSELL *v.* SUTTILL - - - - - - 498

—— County prison—Inquest on prisoner—Jurisdiction - - - - - 322
See CORONER.

MUSHROOMS—Damage to property - - 217
See CRIMINAL LAW.

MUTUAL INSURANCE—Action for consideration—Right to sue undisclosed principal of member of association - - - 110
See INSURANCE (MARINE). 2.

NAVY—Officer—Right to resign commission—Conditions of service - - - - 13
See OFFICER.

NECESSARIES—Infant—Evidence - - 509
See INFANT.

NEGLIGENCE—*Master and Servant—Breach of Statutory duty—Volenti non fit injuria—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 2—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76).] The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine under s. 52 of the Coal Mines Regulation Act, 1872, required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880:—*Held*, that the defence arising from the maxim volenti non fit injuria was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover.—*Thomas* v. *Quartermaine* (18 Q. B. D. 685) discussed. BADDELEY *v.* EARL GRANVILLE - - - - - - 423

2. —— *Employer and Workman—Driver employed by Wharfinger—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Vicious Horse—Risk voluntarily incurred—Volenti non fit Injuria—"Workman"—"Plant," "Defect" in Condition of.*] In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment

NEGLIGENCE—*continued.*
of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal, and his leg was broken:—*Held*, by Lord Esher, M.R., Lindley, L.J., and Lopes, L.J., sitting as a Divisional Court, that the plaintiff was a "workman" within the definition in s. 8 of the Act:—*Held*, by the majority of the Court, Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., expressing no opinion), that the horse which injured the plaintiff was "plant" used in the business of the defendant, and that the vice in the horse was a "defect" in the condition of such plant, within the meaning of s. 1 of the Act:—*Held*, by the majority of the Court, Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., dissenting), that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively shew that the risk was voluntarily incurred by the plaintiff.—*Thomas* v. *Quartermaine* (18 Q. B. D. 685) distinguished.—By Lopes, L.J., dissenting, that there was no evidence for the jury of the defendant's liability, inasmuch as the facts shewed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment. YARMOUTH *v.* FRANCE - - - - - - 647

3. —— *Employers' Liability Act*, 1880, 43 & 44 *Vict. c.* 42, *s.* 1, *sub-ss.* 2, 3—*Negligence of Fellow Workman—Person "intrusted with Superintendence"—Ganger or Foreman of Labourers.*] In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff with other workmen was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. The bales were hauled to the hatchway and dropped down to the workmen below; B., who worked on the deck, giving a signal to the men below before the bales were dropped. The plaintiff, who was below, was injured by a bale which, according to his statement, came down without any warning:—*Held*, that the plaintiff was not entitled to recover, for there was no evidence that his injury was caused by the negligence of a person who had "any superintendence intrusted to him, whilst in the exercise of such superintendence," or by reason of the "negligence of any person in the service of the defendant to whose orders or directions the plaintiff was bound to conform." KELLARD *v.* ROOKE - - - - - - 585

—— Wharfinger, Negligent representation—Loss of goods—Estoppel - - - 68
See ESTOPPEL.

NEW TRIAL, MOTION FOR — Indictment — Practice—Verdict of acquittal - 590
See Bridge.

NOTICE—Omission to give—Life policy—Death by accident - - - - 237
See Insurance (Life).

NOTICE OF ACTION—Act done under the provisions of this Act—Penalty - 352
See Local Government Acts. 2.

OFFICER—*Navy—Right to resign Commission—Conditions of Service—Desertion—Naval Discipline Act*, 1866 (29 & 30 *Vict. c.* 109)—*Admiralty Regulations, art.* 160.] A commissioned officer in the Royal Navy who has accepted an appointment to serve on board one of Her Majesty's ships in commission, and who is entered on the ship's books, is not entitled without permission from the Admiralty to resign his commission and to leave his ship.—Such an officer does not by resigning his commission without the permission of the Admiralty cease to be "a person belonging to Her Majesty's navy" within s. 87 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109).—Sect 50 of the Naval Discipline Act, 1866, which provides that every officer in command of one of Her Majesty's ships, or the senior officer present at a port, may by warrant under his hand authorize any person to arrest any offender subject to this Act for any offence against the Act mentioned in such warrant, does not prevent a naval officer, being "a person subject to the Act" within the meaning of s. 51, from arresting such offender without a warrant. The Queen *v.* Cuming. Ex parte Hall 13

OFFICIAL RECEIVER—Person aggrieved—Refusal of application for adjudication of bankruptcy on non-approval of scheme of arrangement - - - - 174
See Bankruptcy. 2.

PARLIAMENT — *Parliamentary Election — Returning Officer's Charges—Taxation of—Parliamentary Elections (Returning Officers) Act*, 1875 (38 & 39 *Vict. c.* 84)—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33).] At a parliamentary election the high sheriff was the returning officer, the duties being performed on his behalf by a firm of solicitors, one of whom was under-sheriff. The returning officer's charges included a charge for professional assistance rendered to him by the under-sheriff's firm, which was disallowed on taxation, on the ground that no detailed account was sent in to the returning officer within fourteen days of the return, as required by s. 5 of the Returning Officers Act, 1875:—*Held*, that the charge was wrongly disallowed on the above ground, the section not being applicable, as between the returning officer and the candidates, to charges made for work done for the returning officer by his own agents.—The right of a returning officer under s. 2 of the same Act to be paid his reasonable charges and expenses is not limited to such charges only as have been vouched under ss. 4 and 5 of the Act, nor is a charge made by him to be disallowed merely because in the account sent in by him to the candidates it appears under a wrong heading. — A returning officer is not limited to charging for such services and expenses as come verbatim et literatim within the descriptions in the schedule to the Act, if they are services and expenses of one of the kinds mentioned in the schedule. A charge for storing ballot-boxes from one election to another in order to avoid the expense of procuring fresh ones was therefore allowed, although no such charge is expressly provided for in the schedule to the Act. In re Election for South-Eastern Division of Essex - - - - 252

—— Opposition to bill—Borough—Owners and proxies—Time for sending in claims—Obligation to keep register - 22
See Municipal Corporation.

PARTNER — Business carried on in colony—Share of profits not remitted to England—Income tax - - - 400
See Revenue. 2.

PARTNERSHIP — *Liabilities—Sale of Goods—Bill given for Price—Unsatisfied Judgment on Bill—Action against Joint Contractor for Price—Res Judicata.*] An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract.—The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved. The plaintiffs, who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership name. The plaintiffs sued W. in the partnership name on the bills, and recovered judgment, which was not satisfied. The plaintiffs afterwards sued the defendant for the price of the goods:—*Held*, that the case was within the principle of *Kendall* v. *Hamilton* (4 App. Cas. 504), and the judgment against W. on the bills was an answer to the action. — *Drake* v. *Mitchell* (3 East, 251) distinguished. Cambefort *v.* Chapman - - 229

—— Bill of exchange—Bill drawn on firm—Acceptance in name of individual - 223
See Bill of Exchange.

—— Breach of trust—Bankruptcy—Joint and separate proof - - - 84
See Bankruptcy. 10.

—— Loan by wife to partnership in which husband a partner—Bankruptcy of partnership—Wife's proof - - - 88
See Bankruptcy. 9.

PAYMENT INTO COURT—Denial of liability—County court - - - 170
See County Court. 2.

—— Denial of liability—Order for payment out
See Practice. 10. [463

PENALTY—Notice of action—Act done under the provisions of this Act - 352
See Local Government Acts. 2.

PERJURY—Examination before Court of Bankruptcy—Absence of registrar during examination - - - - 213
See Criminal Law. 2.

PHYSICIAN — Medical practitioner — Unregistered assistant — Right of registered practitioner to recover for servies of 303
See Medical Practitioner.

PICTURE — Copyright — Infringement — Copies made before registration — Sale after registration - - - 48
See COPYRIGHT.

—— Copyright — Infringement — Injunction — Damages—Penalties - - 629
See COPYRIGHT. 2.

PILOTAGE COMPULSORY—Exemption—Ship—London district—Ship trading to place north of Boulogne - - - 447
See SHIP. 3.

POLL—Borough—Opposition to bill in Parliament—Obligation of town council to keep register of owners and proxies 22
See MUNICIPAL CORPORATION.

POOR LAW — *Settlement — "Widowed Mother" —Child under Sixteen—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] A pauper under the age of sixteen, whose father was dead and whose mother resided abroad, having become chargeable to a parish in the respondent union, an order was made for her removal into the appellant union, where her deceased father had during his lifetime acquired a settlement:—*Held*, affirming the judgment of the Queen's Bench Division, that the order was bad; that the language of s. 35 of the Divided Parishes Act, 1876, is to be interpreted with reference to the moment of adjudication upon the application for an order of removal; that the word "wife" in that section therefore does not include a widow, and that under the words "shall take the settlement of its father, or of its widowed mother, as the case may be," the pauper took her mother's birth settlement, as being the settlement of her surviving parent at the moment of adjudication.—*Guardians of Maidstone Union* v. *Guardians of Holborn Union* (17 Q. B. D. 817) and *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse* (18 Q. B. D. 528) discussed and approved. GUARDIANS OF POOR OF CROYDON UNION *v.* GUARDIANS OF POOR OF REIGATE UNION - - C. A. 385

POOR-RATE — *Assessment — Valuation (Metropolis Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 47—*Provisional List—Alteration in Value of Hereditament during Year—Diminution of Income.*] By s. 47 of the Valuation (Metropolis) Act, 1869, "if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value," the overseers are, upon the written requisition of any ratepayer, to send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament, and upon default of the overseers the assessment committee are to appoint a person to make such provisional list:—*Held*, that the words "from any cause increased or reduced in value," are not confined to an increase or reduction caused by structural alterations in the hereditament, that a substantial diminution in profits and income is within the meaning of the section, and that where a primâ facie case of such a diminution is made out the assessment committee is bound, on default of the overseers, to appoint a person to make out a provisional list. THE QUEEN *v.* ASSESSMENT COMMITTEE OF ST. MARY, ISLINGTON - - 529

POOR-RATE—*continued.*

2. —— *Occupation — Advertising Hoardings —Agreement creating Tenancy—Liability to be rated.*] By an agreement between an owner of land and an advertising agent the owner agreed to let and the agent to take an advertising station at a yearly rent, the tenancy to commence from completion of erection, and continue seven years, and the agent agreed to pay rates and taxes.—By another agreement an owner agreed to allow the advertising agent the privilege of erecting an advertising hoarding, the agent to pay a yearly rent, and the owner agreed to allow the agent the further privilege of removing a wall, the agreement to remain in force for three years, and be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he agreed to refund 20*l.*—In both agreements the dimensions of the hoardings to be erected were specified.—Advertising hoardings supported on posts fixed into the ground were erected. In the first case the structure was used partly by the owner as a shed, and partly by the advertising agent as a hoarding; in the second case, exclusively by the agent as a hoarding:—*Held*, that each of the agreements created a tenancy, and conferred an exclusive occupation, and not merely a licence, and therefore the advertising agent was liable to be rated to the relief of the poor in respect of both hoardings as occupier of advertising stations. TAYLOR *v.* OVERSEERS OF PENDLETON - 288

3. —— *Rateability of Premises occupied as a certified Reformatory School—The Reformatory Schools Act*, 1866 (29 & 30 *Vict. c.* 117), *s.* 4.] Premises occupied as a school, the managers of which have received a certificate under the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 4, are liable to be rated to the poor-rate.—*Sheppard* v. *Bradford* (16 C. B. (N. S.) 369; 33 L. J. (M. C.) 182) dissented from. TUNNICLIFFE *v.* OVERSEERS OF BIRKDALE - - 280

4. —— *Tithes in London—Rate on House Property—Commutation for fixed Annual Payment—Payment in Lieu of Tithes—*37 *Hen.* 8, *c.* 12—44 & 45 *Vict. c. cxcvii.*—43 *Eliz. c.* 2.] By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London and their successors of a rate made upon the inhabitants and calculated upon the rent of the houses in the city. In this and several subsequent statutes these payments were described as tithes.—A special Act passed in 1881 provided that all tithes and sums of money in lieu of tithes arising or growing due in a parish in London should cease and be extinguished, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum, to be levied and collected in the same manner as the poor-rates. Neither the above-mentioned tithes nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor:—*Held*, affirming the decision of the Queen's Bench Division, that the owner was not rateable to the poor-rate in respect of this fixed annual sum, as such sum was a personal payment, and was not a payment in lieu of tithes rateable under 43 Eliz c. 2. ESDAILE *v.* ASSESSMENT COMMITTEE OF CITY OF LONDON UNION [C. A. 431

PRACTICE—*Amendment—Claim barred by Statute of Limitations.*] A plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations. Weldon *v.* Neal - **C. A. 394**

2. —— *Appeals—Stay of Execution pending Appeal to House of Lords—Application, where to be made.*] An application for a stay of execution pending an appeal to the House of Lords from the Court of Appeal ought in all cases to be made to the Court of Appeal. Hamill *v.* Lilley **C. A. 83**

3. —— *Appeal from County Court—Time for appealing when there has been a Motion in the County Court for a New Trial.*] In an action tried in the county court an appeal will not lie against the decision of the county court judge on an application for a new trial; so that the time within which the unsuccessful party in the county court may appeal to the Queen's Bench Division begins to run from the date of the judgment at the trial, and not from the date of the judge's decision on the application for a new trial. McHardy *v.* Liptrott - - **151**

4. —— *Costs—Order LXV., r. 1—Event—Claim admitted on Pleadings—Counter-claim.*] The plaintiff claimed 78*l.* 15*s.* in respect of a quarter's rent of premises let furnished to the defendant. The defendant by his pleadings admitted the claim, but counter-claimed a larger amount as damages in respect of the insanitary condition of the demised premises. The action was tried by a jury, who found for the defendant on the counter-claim with 17*l.* 16*s.* damages. The judge at the trial ordered that judgment should be entered for the plaintiff for the amount of the claim with costs down to the date of the counter-claim, and that judgment should be entered for the defendant for 17*l.* 16*s.* on the counter-claim, with the costs of the counter-claim and subsequent thereto including the costs of the trial:—*Held*, that the effect of the judge's order as regards costs was to prevent them from following the "event," and that in the absence of "good cause" he had no jurisdiction to make such order. Wight *v.* Shaw - - - - - **C. A. 396**

5. —— *Jurisdiction—Transfer to County Court—Action for Slander—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 10—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 67.] Notwithstanding s. 67 of the Supreme Court of Judicature Act, 1873, which applies the provisions of s. 10 of the County Courts Act, 1867, to actions in the High Court in which relief is sought which can be given in a county court, there is still jurisdiction under s. 10 of the County Courts Act, 1867, to remit an action for slander to a county court. Stokes *v.* Stokes - - - **62**

6. —— *Transfer of Action to County Court for Trial—Jurisdiction—Action for Slander—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 67.] Notwithstanding the provisions of s. 67 of the Judicature Act, 1873, which applies the provisions of s. 10 of the County Courts Act, 1867, to "all actions in the High Court in which any relief is sought which can be given in a county court," there is still jurisdiction, under s. 10 of the County Courts Act, 1867, to remit an action for slander to a county court for trial.—Decision of Queen's Bench Division (ante, p. 62) affirmed. Stokes *v.* Stokes - - - - **C. A. 419**

7. —— *County Court—Remitted Issue—Appeal—New Trial—County Court Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 26—*Order LIX., r.* 9.] Order LIX., r. 9, does not apply to cases in which the issues in an action are remitted to a county court for trial under 19 & 20 Vict. c. 108, s. 26. In such cases, therefore, an application for a new trial must still be by motion for a rule nisi under the old practice. Hughes *v.* Finney - - - - - **522**

8. —— *Interpleader—Appeal—Decision in a summary Manner—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Rules of Supreme Court*, 1883, *Order LVII., rr.* 8, 11—*Bill of Sale—Power to have Goods valued and purchase them—Term for Maintenance of Security—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule.*] A summary decision under Order LVII., r. 8, by a judge at chambers, on an interpleader summons, is final and conclusive, and no appeal lies from such decision, and there is no power to give leave to appeal.—So *held*, by the Court of Appeal, affirming the decision of the Queen's Bench Division.—Per Day and Wills, JJ. A power given to the grantee of a bill of sale to sell the goods "or to have them valued, and to purchase them at such valuation, and receive the moneys to arise from such sale or valuation," is not a term for the maintenance of the security within the meaning of the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and, therefore, a bill of sale which contains a clause giving such power is void by s. 9. Lyon *v.* Morris **C. A. 139**

9. —— *Interpleader—Charges of Sheriff subsequent to Interpleader Order—Right of Appeal under County Courts Act*, 1850 (13 & 14 *Vict. c.* 61), *s.* 14.] In an interpleader proceeding on the application of the sheriff, the claimant, if successful, is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order.—The incidence of such charges is a matter of law and a proper subject of appeal from a county court to the High Court under the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14. Goodman *v.* Blake - - - **77**

10. —— *Money paid into Court with Denial of Liability—Order for Payment out—Order XXII., r.* 6 (*c*).] Where money is paid into court with a defence denying liability, and the plaintiff does not accept it in satisfaction, an order for payment of such money out of court cannot be made until after the trial or other determination of the action. Maple *v.* Earl of Shrewsbury and Talbot - - **C. A. 463**

11. —— *Notice of Trial—Notice of Trial "no longer in force"—Entry of Cause for Trial—Time for Application for a Trial by Jury—Order XXXVI., rr.* 6, 16.] By Order XXXVI., r. 6, upon the application within ten days after notice of trial has been given, of any party for a trial with a jury of the cause, an order shall be made for a trial with a jury.—Notice of trial was given by the plaintiff, but the cause was not entered for trial by either party within the time prescribed

PRACTICE—*continued.*

by the Rules, and the notice was therefore no longer in force. The plaintiff gave a second notice of trial, entered the cause for trial on the same day, and then applied for a trial by jury:—*Held*, by Field, J., confirming the order of A. L. Smith, J. (Manisty, J., dissenting), that under Order XXXVI., r. 6, the application for a jury was too late.—Per Manisty, J. The first notice of trial should under the circumstances be regarded as countermanded by consent. The second notice of trial was therefore valid, and the application for a trial by jury was made in time within Order XXXVI., rr. 6, 16. TONSLEY *v.* HEFFER [153

12. —— *Referee — Compulsory Reference — Power to refer compulsorily all Issues where Part of Matter in Dispute is Matter of mere Account—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 75), *s.* 3—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 57.] Under s. 3 of the Common Law Procedure Act, 1854, the Court or a judge has jurisdiction to refer compulsorily the whole matter in dispute in an action, if any part of the matter in dispute consists of matter of mere account which cannot conveniently be tried in the ordinary way.—So *held* by Fry and Lopes, L.JJ.—By Lord Esher, M.R.:—If any part of the matter in dispute can be brought within s. 3 of the Common Law Procedure Act, 1854, as being matter of mere account which cannot conveniently be tried in the ordinary way, then s. 57 of the Judicature Act, 1873, applies, and the Court or a judge has jurisdiction to refer compulsorily, under that section, all the issues in the cause.—Decision of the Queen's Bench Division affirmed. KNIGHT *v.* COALES - - - - - C. A. 296

13. —— *Reference for inquiry and report under Judicature Act*, 1873, *s.* 56—*Referee, Application to vary Report of—Power of Referee under s.* 56 *to examine Witnesses—Company borrowing ultra vires—Equity of Lender to be subrogated to Rights of Creditors paid out of Money borrowed—Debt not in existence at Time of Advance.*] The Judicature Act, 1873, s. 56, contemplates an inquiry by the examination of witnesses, and not only an inquiry by personal observation of the referee.—The equitable doctrine by which the lender of money borrowed by a company ultra vires is entitled to be subrogated to the rights of creditors of the company paid out of such money, and to recover from the company the amount of their debts or liabilities so paid off, is not confined to the amount of debts and liabilities existing at the time of the advance and so paid off, but extends to debts and liabilities accruing subsequently to and paid out of such advance.—*Blackburn Benefit Building Society* v. *Cunliffe, Brooks & Co.* (22 Ch. D. 61) discussed. BARONESS WENLOCK *v.* RIVER DEE COMPANY - - - - C. A. 155

14. —— *Third Party Notice—Contracts of Indemnity—Marine Insurance—Policy—Suing and Labouring Clause—Order XVI., r.* 48.] The defendant insured his ship under a policy containing the usual suing and labouring clause. In an action to recover for work alleged to have been done and expenses incurred by the plaintiffs for the defendant, at his request, in respect of attempting to save the ship during the continuance of

PRACTICE—*continued.*

the policy:—*Held* (affirming the decision of the Queen's Bench Division), that the defendant was not entitled to bring in the underwriters as third parties under Order XVI., r. 48, because they did not, by the suing and labouring clause, contract to indemnify the defendant in respect of any contract made by him with the plaintiffs. JOHNSTON *v.* SALVAGE ASSOCIATION - C. A. 458

15. —— *Specially indorsed Writ—Time for Service—Order XX., r.* 1; *Order LXIV., r.* 11.] A specially indorsed writ is not a pleading within the meaning of Order LXIV., r. 11, and service thereof may therefore be effected at any hour of the day. MURRAY *v.* STEPHENSON - - 60

—— Costs—Solicitors' Remuneration Act, 1881—Non-contentious business—"Perusing" *See* SOLICITOR AND CLIENT. [1

—— Execution—Proceeds of execution wrongfully retained during vacancy of shrievalty - - - - - 575
See SHERIFF.

—— Indictment—Amendment - - 602
See HIGHWAY.

—— Mayor's Court, London—Appeal to High Court—Claim over 20*l.*—Leave to appeal - - - - - 210
See MAYOR'S COURT.

—— Payment into Court—Denial of liability—County Court - - - 170
See COUNTY COURT. 2.

PRINCIPAL AND AGENT—Bill of exchange—Bill drawn on firm—Acceptance in name of individual—Authority to accept 223
See BILL OF EXCHANGE.

—— Mutual association for—Marine insurance—Action for contribution - - 110
See INSURANCE, MARINE. 2.

PRINCIPAL AND SURETY—Guarantee—Consideration — Forbearance — Promissory note - - - - - 341
See CONTRACT.

PRISON—Inquest on prisoner—Prison for county—Jurisdiction - - - 322
See CORONER.

PROMISSORY NOTE—Given concurrently with bill of sale—Registration - - 512
See BILL OF SALE. 3.

—— Principal and surety — Guarantee — Consideration—Forbearance - - 341
See CONTRACT.

PROPERTY TAX—Public school—Allowances
See REVENUE. [79

PROVISIONAL ORDER—Expenses of carrying out—Local authority—Apportionment of contributions - - - 270
See LOCAL GOVERNMENT ACTS.

RAILWAY — Carrier — Delay in delivery of samples—Loss of season—Measure of damages - - - - 30
See CARRIER.

—— Passenger's luggage — Special contract — Conditions of non-liability - 64
See CARRIER. 2.

RAILWAY COMPANY—*Arbitration—Agreement 'confirmed and made binding" by, and scheduled to, Private Act—Jurisdiction of Railway Commissioners—Regulation of Railways Act* (36 & 37 *Vict. c.* 48), *s.* 8—*Prohibition.*] An agreement was entered into between two railway companies, one of the clauses of which provided that all questions of difference arising out of the agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859. A private Act of Parliament was subsequently passed, in which the agreement was set out verbatim as a schedule, and it was provided by the Act that the scheduled agreement should be "confirmed and made binding" upon the parties thereto. Differences having arisen, one of the companies applied to the Railway Commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. The other company having obtained a rule nisi for a prohibition on the ground that without their consent the Railway Commissioners had no jurisdiction to entertain the application:—*Held*, that the right to refer differences to arbitration was derived from the agreement itself; that the difference was not "required or authorized to be referred to arbitration under the provisions of any general or special Act" within the meaning of s. 8 of the Regulation of Railways Act, 1873, and that the Railway Commissioners had no jurisdiction to undertake the arbitration. The Queen *v.* Midland Railway Company - - - - 540

RATIFICATION—Contract—Estate of deceased testator—Services for benefit of estate [234
See Executor and Administrator.

REFEREE—Application to vary report of—Power of referee to examine witnesses - 155
See Practice. 13.

REFERENCE—Part of matter in dispute—Matter of mere account—Power to refer compulsorily all issues - - - 296
See Practice. 12.

REFORMATORY—Rateability—Premises occupied as reformatory schools - 280
See Poor-rate. 3.

REGISTER—Dentist register—Withdrawal of diploma of licentiate by medical authority—Erasure from register - 467
See Dentist.

REGISTRAR—Bankruptcy—Absence during examination of witness—Perjury - 213
See Criminal Law. 2.

REGISTRATION—Bill of sale—Promissory note forming part of contract—Defeasance
See Bill of Sale. 3. [512

RETURNING OFFICER—Taxation of charges—Parliamentary elections - - 252
See Parliament.

REVENUE—*Landlord's Property Tax—Allowances—Public School—Charitable Institutions—* 5 & 6 *Vict. c.* 35, *s.* 61, *rule VI.*] By s. 61, rule VI., of 5 & 6 Vict. c. 35, allowances in respect of property tax levied under Schedule A. of the Income Tax Acts, are to be made by the Commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises" belonging thereto, if occupied under certain specified conditions:—*Held* (affirming the judgment of the Queen's Bench Division), that a school founded and carried on by the corporation of London under the provisions of an Act of Parliament, not for purposes of profit but for the benefit of a large portion of the public, and maintained partly by a charitable endowment, was a "public school" within the meaning of rule VI., notwithstanding the fact that the school was partly maintained by fees charged for instruction. Blake *v.* Mayor, &c., of City of London - - C. A. 79

REVENUE—*continued.*

2. —— *Income Tax—Business carried on solely in Australia—Partner residing in England—Liability of such Partner in respect of his Share of Profits not remitted to him in England—5 & 6 Vict. c.* 35, *ss.* 100, 106, 108—16 & 17 *Vict. c.* 34, *s.* 2, *Sched. D.*] The respondent, who resided wholly in England, was a partner in a firm carrying on business solely in Melbourne, Australia. Large profits were made by the firm, and a portion of the respondent's share of the profits was remitted to him in England, which portion was duly returned by him for assessment to the income tax under Schedule D. The larger portion of his share of the profits of the firm was never remitted to him in England, but was left in Australia, and never at any time formed part of the income of this country. The appellant contended that the respondent was liable in respect of the whole of his share of the profits, whether received by him in England or not:—*Held*, by Stephen, J. (dissentiente Wills, J.), that the respondent was liable in respect of the whole of his share as being profits or gains arising or accruing to a person residing in the United Kindom from a trade carried on in the United Kingdom or elsewhere, within the meaning of 16 & 17 Vict. c. 34, s. 2, Sched. D.—By Wills, J. The profits of the Melbourne firm were "foreign" as distinguished from "British" property, and as such were not liable to the operation of the Income Tax Acts until they were received in this country. Colquhoun *v.* Brooks - - - - 400

3. —— *Bodies corporate or unincorporate—Duty—Property appropriated for the Promotion of Education or Science, what is—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-s.* 3.] By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied "for the promotion of education, literature, science, or the fine arts":—*Held*, that the property of the Institution of Civil Engineers was not entitled to the benefit of the exemption, because it was property appropriated and applied, not for the promotion of general education or science, but for the promotion of a particular branch of knowledge in order to enable the members of the institution to practise with more success the profession of a civil engineer. In the Matter of Duty on the Estate of the Institution of Civil Engineers - 610

REVENUE—*continued.*

4. —— *Income Tax Acts, Sched. D.—Exemption—Payments "applied to Charitable Purposes only," what are—5 & 6 Vict. c. 35, s. 105.*] The managing committee of a hospital, founded by voluntary contribution for the care and treatment of insane persons, made large yearly profits by receiving wealthy patients, who were charged sums greatly exceeding the actual cost of their maintenance and treatment. The committee applied a portion of those profits in aid of the maintenance and treatment of poorer patients, who were themselves unable to pay the actual cost thereof, and the remainder in executing works which were pressed upon the committee by the Commissioners in Lunacy, and were deemed necessary to bring the hospital into a proper state of efficiency:—*Held*, that the profits were not, by reason of such application of them to the purposes of the hospital, payments "applied to charitable purposes only" within the meaning of s. 105 of 5 & 6 Vict. c. 35, so as to exempt the institution from payment of income tax under Sched. D. ST. ANDREW'S HOSPITAL, NORTHAMPTON *v.* SHEARSMITH - - 624

5. —— *Excise—Dilution of Beer by Publican—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 8.] By s. 8, sub-s. 2, of the Customs and Inland Revenue Act, 1885, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification." . . . . The appellant, a publican, had in his cellar a cask of beer supplied by a firm of brewers, and also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, and filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing (except the finings) was added to the beer.—On appeal against a conviction for "diluting" beer under the above section:—*Held*, that the mixing of the two kinds of beer amounted to a dilution of the stronger beer, and that the appellant was properly convicted. CROFTS *v.* TAYLOR - - 524

6. —— *Stamp Duties on Accounts—Voluntary Settlement—Interest for Life—Reservation to Settlor—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*).] By a voluntary settlement the settlor assigned to trustees a sum of money, with interest, upon certain trusts, and subject to certain powers, provisoes, agreements and declarations, and it was declared that the trustees should apply the income for the benefit of the settlor and his wife and children, or, at their discretion, for the benefit of one or more of such persons to the exclusion of the others, and after the settlor's death the money was to be held subject to trusts in favour of his widow and children:—*Held*, that, notwithstanding the power conferred upon the trustees of depriving the settlor of the benefit of the settled property at their discretion, an interest in such property for life was reserved to the settlor, within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and therefore on his death duty was payable. ATTORNEY-GENERAL *v.* HEYWOOD AND OTHERS - - - - 326

REVENUE—*continued.*

7. —— *Income Tax — Tithe Rent-charge — "Annual Value"—Income-Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *and* 1853 (16 & 17 *Vict. c.* 31.] The words "annual value" in s. 52 of the Income-Tax Act, 1842 (5 & 6 Vict. c. 35), when dealing with tithe commutation rent-charge, mean the sum which the tithe-owner actually receives, after deducting sums paid for rates and procurations, and also the sum which he necessarily and properly expends and is compelled to expend, in order to realize his tithe. REV. C. A. STEPHENS *v.* BISHOP [442

RULE—Validity of—Bankruptcy—Board of Trade—Order or discharge - - 182
See BANKRUPTCY. 3.

RULES—Order IX., rr. 11, 12 - - 170
See COUNTY COURT. 2.

—— Order XVI., r. 48 - - - 458
See PRACTICE. 14.

—— Order XX., r. 1 - - - - 60
See PRACTICE. 15.

—— Order XXII., r. 6 (c.) - - - 463
See PRACTICE. 10.

—— Order XXXVI., rr. 6, 16 - - 153
See PRACTICE. 11.

—— Order LI., r. 27 - - - - 170
See COUNTY COURT.

—— Order LVII., rr. 8, 11 - - - 139
See PRACTICE. 8.

—— Order LIX., r. 9 - - - - 522
See PRACTICE. 7.

—— —— r. 10 - - - - 210
See MAYOR'S COURT.

—— Order LXIV., r. 11 - - - 60
See PRACTICE. 15.

—— Order LXV., r. 1 - - - 396
See PRACTICE. 4.

SALE OF GOODS—*Stoppage in Transitu—Goods bought for Shipment abroad—Delivery of Goods on board Ship—Termination of Transit.*] T., in London, bought goods of C., in Wolverhampton, and sent to C. a consignment note in the following terms:—"Please consign the ten hogsheads hollow ware to the *Darling Downs*, to Melbourne, loading in the East India Docks here." The goods were forwarded by railway to Poplar for shipment, and were shipped on the *Darling Downs* for Melbourne at noon on July 3. About 10 o'clock on the same morning C., at Wolverhampton, having heard of T.'s insolvency, sent a written authority to the railway company to stop delivery of the goods, and the railway company at once telegraphed to their agent at Poplar to that effect, but the message did not arrive in time to prevent the shipment of the goods on board the *Darling Downs*. The mate's receipt for the goods was given to the railway company and by them forwarded to T., but no bills of lading in exchange for the receipt were ever applied for by any of the parties. The *Darling Downs* sailed for Melbourne with the goods on board. On July 11 T. presented a bankruptcy petition, and a scheme of

SALE OF GOODS—*continued.*
arrangement was ultimately approved of by the creditors. The trustee under the scheme having claimed the goods:—*Held*, that there was no constructive delivery of the goods to the buyers; and that therefore the transit was not at an end and the notice to stop was good. Bethell *v.* Clark **553**

SALMON FISHERY ACTS—*Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 12), *s.* 30—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 36, *sub-ss.* 2, 4, 5—*Powers of Water-bailiff—Obligation to produce Instrument of Appointment.*] A water-bailiff appointed under the Salmon Fishery Acts, 1865, 1873 (28 & 29 Vict. c. 121, and 36 & 37 Vict. c. 75), is bound before attempting to exercise his power of searching boats, &c., used in fishing to produce the instrument of his appointment. Barnacott *v.* Passmore - - - **75**

SCHOOL — Premises occupied as reformatory school—Rateability - - **280**
See Poor-rate. 3.

—— Property tax—Allowances - - **79**
See Revenue.

SEPARATE ESTATE—Restraint upon anticipation—Contract by wife during coverture—Judgment against her after husband's death - - - - **7**
See Husband and Wife. 3.

—— Married woman—Contract - - **519**
See Husband and Wife. 2.

SESSIONS—Gasworks—Inquiry into state and condition of concern—Jurisdiction—Costs of Inquiry - - - **481**
See Gasworks.

SETTLEMENT—Poor-law - - - **385**
See Poor-law.

—— Voluntary—Avoidance—Administration of estate of deceased insolvent - **92**
See Bankruptcy.

—— Voluntary — Bankruptcy — Avoidance of voluntary settlement executed by bankrupt - - - - - **186**
See Bankruptcy. 11.

—— Voluntary settlement — Stamp — Duty on accounts—Life interest - - **326**
See Revenue. 6.

SERVICE—Specially indorsed writ — Time for service - - - - **60**
See Practice. 15.

SHERIFF—*Under-sheriff—Executor—Vacancy of Shrievalty—Liability of Under-sheriff—Proceeds of Execution wrongfully retained during Vacancy of Shrievality—Form of Action—3 Geo.* 1, *c.* 15, *ss.* 8, 11.] Where an under-sheriff acting as sheriff during the vacancy of the shrievalty under 3 Geo. 1, c. 15, ss. 8, 11 (1), wrongfully retains the proceeds of an execution, an action for money had and received is maintainable against him or his executors by the execution creditor to recover the sum so wrongfully retained. Gloucestershire Banking Company *v.* Edwards - **575**

—— Interpleader—Charges subsequent to interpleader order - - - **77**
See Practice. 9.

SHERIFF—*continued.*
—— Liability of sheriff to landlord for removal of goods under execution after notice of claim for arrears of rent—Forced sale—Measure of Damages - - **563**
See Landlord and Tenant.

SHIP—*Charterparty—Bill of Lading conclusive—Evidence of Quantity shipped—Estoppel—Authority of Captain.*] The defendants chartered the plaintiff's ship for the carriage of a cargo of timber from Memel. The charterparty provided that the ship should there load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchants' risk and expense, and that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. There was a custom at Memel, which, however, did not apply to charterparties in the form of the above-mentioned charterparty, that the captain should take delivery of the timber to be shipped at timber ponds up the river at some distance from the ship, the timber being then rafted down by fishermen to the ship, but being at the shipowner's risk during the process. The captain of the plaintiff's ship, on her arrival at Memel, not being aware of the provisions of the charterparty, allowed the mate to give receipts for the cargo at the timber ponds. Part of the timber included in such receipts was lost during the process of rafting the timber down to the ship, owing to the force of the current. The captain, having become aware of such loss and of the provisions of the charterparty, stated to the agent at Memel of the shippers, who had sold the timber to the defendants, that he did not see his way to signing clean bills of lading for the full quantity mentioned in the mate's receipts, a portion of the timber having been lost; but, on being told by such agent and a clerk of the ship's brokers that he was bound to sign clean bills of lading for the full quantity, he did so. The bills of lading stated that such quantity was shipped in good order and well conditioned to be delivered on payment of freight and all other conditions as per charterparty. In an action for balance of chartered freight the defendants counter-claimed in respect of short delivery of cargo:—*Held*, that the bills of lading estopped the plaintiff from denying that the full amount of cargo stated therein was shipped. Lishman *v.* Christie & Co. - - **C. A. 333**

2. —— *General Average — Stranding—Effect of Discharge of Part of the Cargo before the Commencement of Extraordinary Measures for getting off the Ship.*] A steamer, carrying among other cargo a large amount of specie, ran aground and lay in a dangerous position. The specie was landed by the master soon after the vessel struck. After the landing of the specie the master jettisoned part of the cargo, and had recourse to other extraordinary measures for getting off the vessel. These measures succeeded, and she completed her voyage with the cargo remaining on board. The specie was conveyed to a neighbouring port, whence it was sent on in another vessel, but for the purposes of the case was to be treated as having arrived in the steamer:—*Held*, that the losses and expenses incurred in getting the

SHIP—*continued.*

steamer off, and the expenses incurred in landing and conveying the specie, were not general average to which the owners of the specie were liable to contribute. ROYAL MAIL STEAM PACKET COMPANY *v.* ENGLISH BANK OF RIO DE JANEIRO [362

3. —— *Compulsory Pilotage—London District—Exemption—"Ship trading" to Place north of Boulogne—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 379—*Privy Council Order*, 21 *December*, 1871.] By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, ships trading to any place in Europe north of Boulogne are, when not carrying passengers, exempted from compulsory pilotage in the London district.—A British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London.—On a return voyage from the East she went, as usual, to London. She there discharged part of her cargo and her crew, and then, with the bulk of the cargo and a crew of runners, but without passengers, proceeded to Holland:—*Held*, that she was a ship "trading to" a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district. COURTNEY *v.* COLE 447

4. —— *Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 230—*Dock Tonnage Rates—Vessel "trading inwards"—Arrival and Departure constituting one Voyage.*] The Mersey Dock Acts Consolidation Act, 1858, 21 & 22 Vict. c. xcii., s. 230, provides as follows: "All vessels entering into or leaving the docks shall be liable, according to the tonnage burthen thereof, to pay to the board the rates hereinafter called dock tonnage rates mentioned in Schedule B. to this Act annexed, according to the several and respective classes of voyages described in such schedule: that is to say, to or from the port of Liverpool from or to any parts or places in such schedule mentioned, and such rates shall be paid to the board by the masters or owners of such vessels, and shall be charged as follows: vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool: vessels arriving in ballast but trading outwards, and also vessels built within the port of Liverpool or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards; and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates: vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart: one arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards or arrived or departed in ballast, and without regard to any intermediate ports between which she may have traded whilst absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most

SHIP—*continued.*

distant of all the ports to which such vessel shall have traded: vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards and having paid the rates payable on such trading outwards shall afterwards on trading inwards be liable to the rates payable on vessels trading inwards."—The plaintiffs were the owners of steamships, the practice with regard to their voyages being as follows; they sailed from Glasgow to Liverpool partly laden, entered the Liverpool Docks and there completed their lading discharging no cargo: they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed for Liverpool, entered the docks there, and discharged cargo, and then returned with the remainder of their cargo or in ballast to Glasgow:—*Held*, by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting, that the defendants, the Mersey Docks Board, were entitled under the above-mentioned section to charge in respect of the plaintiffs' vessels using the defendants' docks as aforesaid on their way to India dock tonnage rates as upon vessels trading inwards from Glasgow, and on such vessels using the docks as aforesaid on their return voyage from India rates as on vessels trading inwards from India.—By Lord Esher, M.R. The defendants were entitled to charge on the plaintiffs' vessels using the docks as aforesaid on their way to India dock tonnage rates as on vessels trading outwards to India, and on such vessels using the docks on their return voyage from India as aforesaid rates as on vessels trading inwards from India. HENDERSON BROTHERS *v.* MERSEY DOCKS AND HARBOUR BOARD [C. A. 123

—— Carrier—Improper navigation - 242
See INSURANCE (MARINE).

—— Dumb barge—Assignment—Registration as bill of sale - - - - 200
See BILL OF SALE. 2.

SIGNIFICAVIT—Contempt—Ecclesiastical Court—Writ de contumace capiendo - 307
See ECCLESIASTICAL LAW.

SLANDER—Action—Transfer to county court—Jurisdiction - - 62, 419
See PRACTICE. 5, 6.

SOLICITOR AND CLIENT—*Costs—Non-contentious Business—Advances on Security of Real Property—"Perusing" Title-deeds—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order of August*, 1882, *Sched. II.*] A solicitor making advances to a client upon the security of real property and perusing for that purpose the title deeds of such property, is not entitled to charge at the rate of 1*s.* per folio "for perusing" under the 2nd schedule of the General Order of August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44). IN RE ROBERTSON - - - - - 1

2. —— *Bill of Costs—Interest on Disbursements and Costs—Demand from Client—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 5, *General Order VII.*] By General Order VII. under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5 . . . the interest which

SOLICITOR AND CLIENT—*continued.*
a solicitor is entitled to recover under the Order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation—and it is provided that a solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client.—A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill:—*Held*, that the solicitor was entitled to such interest. Blair *v.* Cordner - - - 516

SPECIAL CASE—Power of justices to state 168
See Justices.

STAMP—Duty on accounts—Voluntary settlement—Life interest - - 326
See Revenue. 6.

STATUTES:—
22 Hen. 8, c. 5 - - - - - 590
See Bridge.
37 Hen. 8, c. 12 - - - - 431
See Poor-rate. 4.
5 Eliz. c. 23 - - - - - 307
See Ecclesiastical Law.
43 Eliz. c. 2 - - - - - 431
See Poor-rate. 4.
8 Anne, c. 14, s. 1 - - - - 563
See Landlord and Tenant.
3 Geo. 1, c. 15, ss. 8, 11 - - - 575
See Sheriff.
53 Geo. 3, c. 127 - - - - 307
See Ecclesiastical Law.
55 Geo. 3, c. 194, s. 21 - - - 303
See Medical Practitioner.
5 & 6 Wm. 4, c. 50 - - - - 602
See Highway.
3 & 4 Vict. c. 86 - - - - 307
See Ecclesiastical Law.
5 & 6 Vict. c. 35 - - - - 442
See Revenue. 7.
—— —— s. 61, rule vi. - - - 79
See Revenue.
—— —— ss. 100, 106, 108 - - 400
See Revenue. 2.
—— —— s. 105 - - - - 624
See Revenue. 4.
9 & 10 Vict. c. 95, s. 12 - - - 170
See County Court. 2.
10 Vict. c. 15, s. 35 - - - 481
See Gasworks.
13 & 14 Vict. c. 61, s. 14 - - - 77
See Practice. 9.
16 & 17 Vict. c. 34 - - - 442
See Revenue. 7.
—— —— s. 2, Sched. D. - - 400
See Revenue. 2.
17 & 18 Vict. c. 31, s. 7 - - - 64
See Carrier. 2.

STATUTES—*continued.*
17 & 18 Vict. c. 75, s. 3 - - - 296
See Practice. 12.
17 & 18 Vict. c. 104, s. 379 - - 447
See Ship. 3.
18 & 19 Vict. c. 120, ss. 105, 140 - - 502
See Metropolis Management Acts.
19 & 20 Vict. c. 108, s. 26 - - - 522
See Practice. 7.
20 & 21 Vict. c. clvii., s. 8. - - 210
See Mayor's Court.
21 & 22 Vict. c. 90, ss. 31, 32 - - 303
See Medical Practitioner.
21 & 22 Vict. c. xcii., s. 230 - - 123
See Ship. 4.
23 & 24 Vict. c. 126, s. 17 - - - 139
See Practice. 8.
24 & 25 Vict. c. 97, s. 52 - - - 217
See Criminal Law.
25 & 26 Vict. c. 68, ss. 1, 3, 4, 6, 10, 11 - 629
See Copyright. 2.
—— —— ss. 1, 4, 6, 11 - - - 48
See Copyright.
25 & 26 Vict. c. 102, ss. 77, 86 - - 502
See Metropolis Management Acts.
28 & 29 Vict. c. 12, s. 30 - - - 75
See Salmon Fishery Acts.
28 & 29 Vict. c. 126, ss. 48, 57 - - 322
See Coroner.
29 Vict. c. 31, ss. 1, 4 - - - 533
See Metropolis Management Acts. 2.
29 & 30 Vict. c. 109 - - - 13
See Officer.
29 & 30 Vict. c. 117, s. 4 - - - 280
See Poor-rate. 3.
30 & 31 Vict. c. 142, s. 10 - - 62
See Practice. 5.
—— —— s. 10 - - - - 419
See Practice. 6.
31 & 32 Vict. c. 71, ss. 3, 5 - - 428
See County Court.
31 & 32 Vict. c. 121, s. 15 - - - 582
See Adulteration.
32 & 33 Vict. c. 67, s. 47 - - - 529
See Poor-rate.
32 & 33 Vict. c. 71, ss. 65, 72, 83 (4) - 679
See Bankruptcy. 13.
35 & 36 Vict. c. 33 - - - 252
See Parliament.
35 & 36 Vict. c. 76 - - - 423
See Negligence.
—— —— s. 17 - - - - 357
See Mine.
35 & 36 Vict. c. 91, s. 4 - - - 22
See Municipal Corporation.
35 & 36 Vict. c 94, s. 8 - - - 478
See Licensing Acts.
36 & 37 Vict. c. 48, s. 8 - - - 540
See Railway Company.
36 & 37 Vict. c. 66, s. 57 - - - 296
See Practice. 12.
—— —— s. 67 - - - - 419
See Practice. 6.

STATUTES—*continued.*

36 & 37 Vict. c. 66, s. 67 - - - - 62
See PRACTICE. 5.

36 & 37 Vict. c. 71, s. 36, sub-ss. 2, 4, 5 75
See SALMON FISHERY ACTS.

38 & 39 Vict. c. 55, ss. 5, 10, 12, 254, 341 352
See LOCAL GOVERNMENT ACTS. 2.

—— —— s. 144 - - - - 602
See HIGHWAY.

—— —— ss. 229, 230, 283, 284 - - 270
See LOCAL GOVERNMENT ACTS.

—— —— Sched. II., r. 19 - - 22
See MUNICIPAL CORPORATION.

38 & 39 Vict. c. 60, s. 22 - - - 491
See FRIENDLY SOCIETY.

38 & 39 Vict. c. 63, s. 6 - - - 582
See ADULTERATION.

38 & 39 Vict. c. 84 - - - 252
See PARLIAMENT.

39 & 40 Vict. c. 61, s. 35 - - - 385
See POOR-LAW.

40 & 41 Vict. c. 21, s. 30 - - - 322
See CORONER.

41 & 42 Vict. c. 31, s. 4 - - - 200
See BILL OF SALE. 2.

—— —— s. 10 - - - - - 512
See BILL OF SALE. 3.

41 & 42 Vict. c. 33 - - - 467
See DENTIST.

42 & 43 Vict. c. 49, s. 33 - - - 168
See JUSTICES.

43 & 44 Vict. c. 42 - - - - 647
See NEGLIGENCE. 2.

—— —— s. 1, sub-ss. 2, 3 - - 585
See NEGLIGENCE. 3.

—— —— s. 1, sub-s. 2 - - - 423
See NEGLIGENCE.

44 & 45 Vict. c. 12, s. 38, sub s. 2 (*c*) - 326
See REVENUE. 6.

44 & 45 Vict. c. 41, ss. 19, 21 - - 204
See BILL OF SALE. 4.

44 & 45 Vict. c. 44 - - - - 1
See SOLICITOR AND CLIENT.

—— —— s. 5 - - - - - 516
See SOLICITOR AND CLIENT. 2.

44 & 45 Vict. c. 75, s. 1, sub-ss. 2–4, ss. 5, 19 7
See HUSBAND AND WIFE.

44 & 45 Vict. c. cxcvii. - - - 431
See POOR-RATE. 4.

45 & 46 Vict. c. 43, s. 3 - - - 200
See BILL OF SALE. 2.

—— —— s. 4 - - - - - 276
See BILL OF SALE.

—— —— ss. 7, 9, 13 - - - 204
See BILL OF SALE. 4.

—— —— s. 9 - - - - 139
See PRACTICE. 8.

—— —— - - - - - 391
See BILL OF SALE. 5.

—— —— s. 17 - - - - 568
See COMPANY.

45 & 46 Vict. c. 50, s. 60 - - - 498
See MUNICIPAL CORPORATION. 2.

STATUTES—*continued.*

45 & 46 Vict. c. 50, s. 171, sub-s. 1, s. 228, sub-s. 4 - - - - - - 322
See CORONER.

45 & 46 Vict. c. 75, s. 1, sub-ss. 2, 3 - 519
See HUSBAND AND WIFE. 2.

—— —— s. 1, sub-ss. 2, 4, and ss. 5, 19 7
See HUSBAND AND WIFE. 3.

—— —— s. 3 - - - - - 88
See BANKRUPTCY. 9.

46 & 47 Vict. c. 37, sched. 11, r. 18 - 84
See BANKRUPTCY. 10.

46 & 47 Vict. c. 52, ss. 18, 27 - - 33
See BANKRUPTCY. 14.

—— —— s. 18, sub-s. 11 - - - 669
See BANKRUPTCY. 15.

—— —— ss. 20, 104, 105, 109 - - 174
See BANKRUPTCY. 2.

—— —— ss. 24, 28 - - - - 39
See BANKRUPTCY. 6.

—— —— s. 27, sub-ss. 1, 2, 3, 4, 5 - 213
See CRIMINAL LAW. 2.

—— —— s. 28, sub-s. 3 - - - 102
See BANKRUPTCY. 12.

—— —— ss. 28, 127 - - - 182
See BANKRUPTCY. 3.

—— —— ss. 44, 47, 125 - - - 92
See BANKRUPTCY.

—— —— s. 45, sub-ss. 1, 2; s. 46 sub-s. 2.
See BANKRUPTCY. 8. [285

—— —— ss. 47, 169 - - - 186
See BANKRUPTCY. 11.

—— —— s. 108 - - - - 538
See BANKRUPTCY. 4.

48 & 49 Vict. c. 51, s. 8 - - - 524
See REVENUE. 5.

—— —— s. 11, sub-s. 3 - - - 610
See REVENUE. 3.

STOPPAGE IN TRANSITU—Goods bought for shipment abroad—Delivery of goods on board of ship—Termination of transit
See SALE OF GOODS. [553

STREET—Paving expenses of—New street in two districts—Order for exclusive by one [502
See METROPOLIS MANAGEMENT ACTS.

SUBROGATION—Company borrowing ultra vires—Equity of lender to be subrogated to rights of creditors paid out of money borrowed—Debts not in existence at time of advance - - - - 155
See PRACTICE. 13.

SUBSTITUTED SERVICE—Bankruptcy—Creditor's petition—Death of debtor before service of petition - - - 538
See BANKRUPTCY. 4.

THAMES—Dumb barge—Registration—Bill of sale - - - - - 200
See BILL OF SALE. 2.

THIRD PARTY—Notice—Contract of indemnity—Marine insurance—Policy—Suing and labouring clause - - 458
See PRACTICE. 14.

TIME—Appeal—County Court—Time for appealing—Motion for new trial - 151
See PRACTICE. 3.
—— Application for trial by jury - - 153
See PRACTICE. 11.

TITHES—London—Rate on house property—Commutation - - - 431
See POOR-RATE. 4.

TITHE RENT-CHARGE—Annual value—Income tax - - - - 442
See REVENUE. 7.

TRIAL—Notice of—Application for trial by jury—Entry of clause for trial - 153
See PRACTICE. 11.

TRUST—Breach of—Partnership—Bankruptcy—Joint and separate proof - - 84
See BANKRUPTCY. 10.

TRUSTEE—Bankruptcy—Meeting of creditors to remove—Power to restrain - 679
See BANKRUPTCY. 13.

VALUATION LIST—Local Government Acts—Expenses of carrying out provisional order - - - - 270
See LOCAL GOVERNMENT ACTS.
—— Metropolis—Poor-rate—Assessment—Provisional list—Alteration in value of hereditament during year—Diminution of income - - - - 529
See POOR-RATE.

VESTRY—Officer—Superannuation allowance—Discretion as to amount - - 533
See METROPOLIS MANAGEMENT ACTS. 2.

VOLUNTARY CONVEYANCE—Avoidance—Bankruptcy—Retrospective effect of Bankruptcy Act, 1883 - - 186
See BANKRUPTCY. 11.

VOLUNTARY CONVEYANCE—*continued.*
—— Bankruptcy—Administration of estate of deceased insolvent - - - 92
See BANKRUPTCY.

WATER BAILIFF—Salmon Fishery Acts—Obligation to produce instrument of appointment - - - 75
See SALMON FISHERY ACTS.

WHARFINGER—Negligence—Holder of warrant - - - - - 68
See ESTOPPEL.

WORDS—"Annual value" - - - 442
See REVENUE. 7.
—— "Defect" - - - - 647
See NEGLIGENCE. 2.
—— "Dilution" - - - - 524
See REVENUE. 5.
—— "Improper navigation of ship" - 212
See INSURANCE, MARINE.
—— "Perusing" - - - - 1
See SOLICITOR AND CLIENT.
—— "Plant" - - - - 647
See NEGLIGENCE. 2.
—— "Seizure and sale" - - - 285
See BANKRUPTCY. 8.
—— "Trading inwards" - - - 123
See SHIP. 4.
—— "Within the United Kingdom" 237
See INSURANCE (LIFE).
—— "Workman" - - - - 647
See NEGLIGENCE. 2.

WRIT—Special indorsement—Time for service
See PRACTICE. 15. [60

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

12 AUG 1977